80-1586

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GULF OIL CORPORATION

and

GULF MINERALS CANADA LIMITED

APPENDIX TO PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE PRENTICE H. MARSHALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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APPENDIX A

EXCERPTS FROM DECEMBER 17, 1980 TRANSCRIPT OF PROCEEDINGS IN NORTHERN DISTRICT OF ILLINOIS CASE NO. MDL 342, pp. 3-10

* * * *

[3] THE COURT: Well, I think I am ready. I think that I am prepared to rule on every motion under Item 1 except the one that I suppose that you are all the most interested—not all the most interested in, but some the most interested in, and that's sanctions.

I haven't got it for you but I do every other motion.

* * * *

[5] 1(d), (e) and (f), these are the multiple motions of Denison Limited, Denison U.S., Gulf, Gulf Minerals of Canada, Rio Algom, Getty, Noranda, and in a somewhat different context but nonetheless raising many of the same questions, Item 1(1), Uranex' position to dismiss the TVA complaint, on the grounds of want of jurisdiction, act of state, state compulsion and comity.

As far as any pure jurisdictional arguments are [6] concerned, I think it is very clear, and I doubt that any lawyer in this room would dispute the proposition that foreign combinations or agreements are subject to the Sherman Act if they have an effect upon American commerce.

The plaintiff is alleged—or the plaintiffs have alleged, and to the extent that I have been exposed to evidentiary materials in the case, there is evidence to support the allegation that the foreign defendants and their foreign activities did affect American commerce, and there is an allegation, and there is sufficient evidence at the present time to warrant submission to the jury the question of whether those activities constituted combinations and agreements in violation of Section 1 of the Sherman Act.

Indeed, the evidence which has been submitted on these various preliminary motions, totally apart from the evidence which was submitted on the sanctions hearing, fills boxes—actually, ladies and gentlemen, there must be back in my chambers the equivalent of six or eight transfer cases of materials that have been submitted, not just on these but on other motions as well.

There just is no doubt that to the extent that jurisdiction is dependent upon the facts in the case, there are issues of fact here which cannot be resolved by motions to dismiss or motions for summary judgment.

Insofar as Act of State is concerned, it is my [7] judgment that with the exception of the Uranex situation, which concededly is somewhat different than the other defendants, that we are not concerned here with a question of Act of State. We are concerned rather with a defense of state compulsion. That defense raises questions of fact.

Two courts that have considered disputes akin to the one that is now here have concluded that that defense raises issues of fact.

I concluded that in the potash case, and I conclude it in this case.

That defense will be submitted here under appropriate instructions to the jury, if there is evidence sufficient to submit that issue to the jury.

I express no opinion now as to whether there will or will not be sufficient evidence to submit it to the jury, nor do I make any suggestion now that when the case is actually tried, that the plaintiff will adduce evidence sufficient to go to the jury on its theory.

Much of the materials that have been submitted to me on these various motions have not been sifted through the adversary process of evidence objections.

I have no feeling at all about as to how much of the—how much of the factual material which has been submitted on the motions will ultimately be deemed admissible at the trial.

[8] But on the papers that have been submitted, to the extent that there is Act of State in the case, I believe more state compulsion, that is an issue of fact which should go to the jury.

Finally, arguments are made with respect to comity, that in the exercise of comity, I should—and the exercise of my discretion I should refrain from entertaining these cases.

Gulf in its brief states that the continuation of this litigation will have adverse effects, and I quote now, "On a broad range of matters affecting the long-term economic and strategic well-being of this country, such as international balances of trade and inflation, NATO, and detente, and on short-term matters of great significcance, such as the Iranian hostage situation, the Olympic boycott—" a bit out of date today, I realize—that's my fault, not the briefwriters—"and the invasion—the Russian invasion of Afganistan."

I don't mean to, by the tone of my voice, to belittle either the importance of this litigation or the sincerity of the persons making those arguments.

But, with all due respect, ladies and gentlemen, I do not believe that that [sic] the future of the crown teeters in the balance of this litigation.

This is tough litigation, represented and presented [9] by lawyers of extraordinary ability, but we will all get up tomorrow or the day after the verdict comes in in this case, and I assure you the sun will still be coming up in the East.

I am cognizant of the fact that there is some displeasure with this case, and indeed there is displeasure with my handling of the case.

But that's true of every case that every judge ever decides. Sometimes it's a person that's displeased with us, sometimes a corporation, sometimes it's a city and its mayor, sometimes it's a state and its governor. Sometimes it's even the President of the United States—not

in this particular litigation or in this particular court, but all of us can recall litigation within the last four or five, six years, in which the President of the United States was displeased.

Our job as members of the American Judiciary, a job which we are given for life, if we pass the tests—why we take it, I don't know, but we are given it for life—is to decide disputes.

The Government has not asked us to stay our hand, save the one letter that I received, and which has been spread on the record with regard to the so-called proceedings.

The Government of the United States initiated a criminal prosecution in this matter.

There are some who say that it was not very vigor-
[10] ous, but nonetheless it brought to bear on the economic-social factual situation the entire weight of the United States Government as plaintiff in an anti—or in a criminal antitrust action.

When that criminal prosecution was initiated, and was disposed of, by, I assume, a negotiated plea—in fact, I know it was from what little I have heard about it—this action was pending.

And I can only construe the handling of the criminal prosecution in part to mean that the Government of the United States, the Justice Department, the Antitrust Division of the Justice Department, was content that this problem be litigated, ventilated and adjudicated, in this private action.

And it's going to be.

So those motions are denied.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

Master File No. 342-A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

URANIUM ANTITRUST LITIGATION
JOINT PRETRIAL ORDER NO. 20

A pretrial conference having been held on December 17, 1980, and the Court having been duly advised by counsel, IT IS HEREBY ORDERED THAT:

* * * *

3. The following motions are denied, with the Court's ruling having been delivered from the Bench:

a. Motions of Gulf, GMCL and Rio Algom Corporation against Westinghouse and TVA for summary judgment based upon act of state, comity and sovereign compulsion;

b. Motion of Denison Ltd. and Denison U.S. against Westinghouse and motion of Denison Ltd., against TVA for summary judgment based upon act of state and comity;

c. Getty's motion for partial summary judgment based on act of state grounds regarding Australia;

d. Noranda's motion to dismiss the Westinghouse and TVA complaints for failure to state a claim on act of state grounds.

* * * *

ENTER:

/s/ Prentice H. Marshall
United States District Court Judge

Dated: January 5, 1981

APPENDIX C

EXCERPTS FROM JANUARY 29, 1981
TRANSCRIPT OF PROCEEDINGS, MDL 342,
NORTHERN DISTRICT OF ILLINOIS, pp. 112-116

[112] THE COURT:

* * * * *

With respect to the other motions for certification, I suppose the first leg of Section 1292 is on the Act of State, foreign compulsion question, is demonstrated by the varying arguments presented by the defendants seeking certification, that there is a ground for difference of opinion.

I persist in my view that there are questions of fact raised by those motions, and that the record on them will not be complete until the case is tried.

I invite the parties in their trial briefs to readdress the question. I invite them to submit instructions on [113] the question, and to debate the instructions on the question.

But I am of the view that there are questions of fact as opposed to questions of law, and that the subject is not an appropriate one for certification until all of the evidence has been ventilated, and it will then be certified in the form of appropriate jury instructions, appropriate evidence rulings, and the final judgment that is entered, whichever way.

In addition to that, Section 1292 enjoins me, I believe, to exercise my discretion.

Interlocutory appeals, piecemeal appeals, are not favored under our system. They are in other systems, but they are not under American law. And one of the reasons that they are not is that they always involve delay.

This is not to say that the Court of Appeals would not act expeditiously. It is not to say that the subsequent

review by the Supreme Court would not be done expeditiously if there was a subsequent review.

But the mere fact that the parties have to take time out and go about their business on other matters, and they are litigating in two courts, and the future of the case in this Court is rendered uncertain—I know I sound like a broken record, ladies and gentlemen, but I have got to remind you again that this isn't the only case I have got. It's the biggest one I have got but it's not [114] the only one I have got and I have to schedule my time accordingly. And I am not persuaded that an interlocutory appeal on the issues of Act of State, foreign compulsion and comity would, in the language of the statute, materially advance the ultimate termination of the case.

As I indicated in colloquy with counsel, I have a case here now, it has nine defaulted defendants, we are waiting for the damage prove up as to them.

That damage prove up, as I understand the Court of Appeals' opinion, is contingent upon what the jury does with respect to the other defendants.

The case is ready to move ahead. The plaintiff wished to move it ahead. The parties took an appeal. I certified the question. The appeal was taken. Now, the plaintiff is told, "You have to wait on those issues". So be it.

As I say, I have six counterclaims. I know that the defendants would be happy to withhold trial of their counterclaims pending review, but the fact of the matter is that there are six counterclaims. They have been brought by responsible counsel, and in the present context of this case they will have to be tried, regardless of the Act of State, foreign compulsion position.

I have some parties who say they want a bench trial. That's minor in its impact on this overall question, [115] but we tentatively ventilated this morning some of the problems inherent in that position, how we are going to manage the case if I grant that motion.

And we are enjoined by the statute, and the words were carefully chosen by the Congress—we are enjoined

by the statute to consider the ultimate termination of the case.

And this case, as Mr. Tucker so eloquently points out, is a very, very complex case which has not been rendered any the less complex by these other factors that I have just mentioned—default, counterclaim, jury trials for some, bench trials for others, and so forth.

And it is my firm conviction that the ultimate termination of this case is best achieved by proceeding on the schedule that we have, and not incurring any risk of delay through interlocutory appeals.

Much the same thing, Mr. Hertzell, is applicable, I believe, to the Illinois Brick position. I will, as you have asked me, reconsider the briefs and the materials which you have submitted on reconsideration and take another look at the 42 million dollar issue, we will call it, because I think you are correct when you say that your position —your overall position really subsumed it. I will take another look at it and see.

But I believe with respect to the overall Illinois Brick situation, that that is a matter, first of all, which [116] does seek, with all respect to you, sir, fractionalization of the plaintiff's claim, and I also believe that it is a question best reserved for the presentation of the evidence in the case, the totality of the record in the case, and what I hope will be proper instructions in the case, and proper evidence rulings in the case, and a proper narrowing of the issues in the case, and so forth.

I don't look forward to spending a year with you ladies and gentlemen trying the case, and having it reversed, as happened to Judge Frankel. And I certainly want to tell you, I don't think that I am any brighter or more capable than Judge Frankel.

The Court of Appeals for the Second Circuit said he made a grave error in that case resulting in its reversal and remand.

But, as I said earlier in colloquy, every time you folks come into the courtroom and every time I come out here on the bench to try a case, and particularly a jury case, we live with the risk of error. There has never been a perfectly-tried case, and there never will be a perfectly-tried case. And piecemeal interlocutory appeals will not give us a perfectly-tried case.

So with the exception of Mr. Millstein's segment, and Mr. Hartzell's 42 million dollar segment, the motions for reconsideration are all denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

VS.

RIO ALGOM LIMITED, *et al.*,
Defendants.

Master File No. 342-A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

URANIUM ANTITRUST LITIGATION
JOINT PRETRIAL ORDER NO. 22

A pretrial conference having been held on January 29, 1981, and the Court having been duly advised by counsel,

IT IS HEREBY ORDERED THAT:

1. All motions by defendants in the Westinghouse and the TVA cases, except that of Uranex, for reconsidera-

tion or certification purusant to 28 U.S.C. 1292(b) of this Court's Order denying their motion for summary judgment or dismissal of the complaints based on act of state, sovereign compulsion and lack of *in personam* jurisdiction are denied.

* * * * *

ENTER:

/s/ Prentice H. Marshall
United States District Court Judge

Dated: 2/13/81

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

Master File No. 342-A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

MEMORANDUM DECISION *

On February 27, 1979, we entered Joint Pretrial Order No. 5 in an effort to narrow and ripen the issues sur-

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* We have delayed this ruling in the hope that the question here decided might be amicably resolved among the parties to these actions and the foreign governments involved (particularly Canada and Australia). *See,* Letter of Latham & Watkins to the Prime Minister and Minister of Energy, Mines and Resources of Canada, dated September 12, 1979. But our hope has turned to despair. This litigation must proceed.

rounding the parties' discovery demands for documents located in foreign countries. We ordered that, by March 28, 1979, all parties should either comply with outstanding discovery demands for "foreign documents" or file restated objections to the production of such documents, including specific and particularized objections to demands for any such documents whose production was said to be forbidden by foreign law. The term "foreign documents" was defined to include all documents whose disclosure was in any way affected by foreign law.

The responses of the parties were varied. Plaintiffs Westinghouse Electric Corporation (Westinghouse) and the Tennessee Valley Authority (TVA) raised no foreign law objections and stated that they either had no foreign documents or were producing all of them. Of the twenty non-defaulting active defendants in the Westinghouse action, six apparently have no foreign documents not previously produced, since they neither produced documents nor stated objections.[1] Two other defendants, Kerr-McGee Corporation and the Anaconda Company, appear to have now produced all responsive foreign documents. Two more defendants, Western Nuclear, Inc. and Phelps Dodge Corporation, were seemingly able to comply with all material document demands. They invoked Australian non-disclosure legislation but frankly summarized the contents of the three Australian documents in such a manner as to convince Westinghouse that it does not need the documents. Ten other defendants have raised foreign law objections and have withheld foreign documents. Those defendants are Rio Algom Corporation (Rio U.S.), Engelhard Minerals and Chemicals Corporation (Engelhard), Denison Mines, Ltd. (Dension Canada), Denison Mines, Inc. (Denison U.S.), Gulf Oil

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[1] The six are Rio Tinto Zinc Corporation of America, Homestake Mining Company, Atlas Corporation, Reserve Oil and Minerals Corporation, United Nuclear Corporation, and Pioneer Nuclear, Inc.

Corporation (Gulf), Gulf Minerals Canada Limited (GMCL), Getty Oil Company (Getty), Utah International, Inc. (Utah), Noranda Mines, Ltd. (Noranda), and Federal Resources Corporation (Federal). In the three TVA actions, in which eight of the thirteen named defendants have appeared, seven of the active defendants have invoked foreign nondisclosure laws as a bar to production.[2] Only one of those defendants, Uranerz Canada Ltd. (Uranerz), is not a defendant in the Westinghouse action.

Westinghouse has moved for production orders pursuant to Rule 37(a), F.R.Civ.P., against the ten non-producing defendants listed above, and TVA has similarly moved against the seven non-producing defendants in its case. The following table connects each defendant with the country whose foreign law is invoked as a bar to production. Defendants who are named in both the Westinghouse and TVA motions are identified by an asterisk (*):

Australia	*Canada*
Engelhard*	Denison Canada*
Getty	Denison U.S.*
Noranda*	Federal
Utah	Rio U.S.*
	Uranerz
South Africa	Noranda*
Engelhard*	Gulf*
	GMCL*
Switzerland	
Gulf*	
GMCL*	

[2] The eighth TVA defendant, Urangesellschaft mbH & Co., has raised no foreign law objections.

Five sets of foreign laws are involved. Three of those are regulations or statutes of Canada, Australia and South Africa which were enacted or modified during the period from 1976 to 1978 for the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel. Those laws generally prohibit the production of any document relating to uranium marketing activities from 1972 through 1975 and also prohibit communications that would result in the disclosure of the contents of such documents. The fourth statute is the Ontario Business Records Protection Act, which was enacted in Canada in 1947. That Act forbids the production of any business records requested by a foreign tribunal if a provincial court issues an order to that effect. Because no such order has been sought or issued to date, this Act has little or no applicability here. The final statutes are Articles 162 and 273 of the Swiss Penal Code, which prohibit the disclosure of a "business or manufacturing secret." Because a violation can be avoided if a person with a secrecy interest in some matter consents to its disclosure, and because Gulf and GMCL expect to secure all necessary consents within a short span of time, the Swiss statutes also have limited applicability here. All of these statutes impose criminal penalties for their violation, including fines and imprisonment.

In addition to plaintiffs' motions to compel, three of the defendants—Getty, Gulf and Utah—have filed motions to compel Westinghouse to produce documents located in Australia, Canada and South Africa. Because Westinghouse has raised no foreign law objections to the production of those documents, these defendants' complaint is that Westinghouse's purportedly complete production of documents is in fact only a partial one. This contention rests mainly on inferences drawn from an affidavit by one of Westinghouse's attorneys, James E. Daniels.

The Daniels affidavit states that Westinghouse documents responsive to defendants' document requests are located in Canada, Australia and South Africa, that the non-disclosure laws of those countries have not deterred Westinghouse's compliance with those requests, and that, based upon his own knowledge and on consultation with others, Daniels is satisfied that copies of all responsive documents in those countries, together with any handwritten and margin notes, are now available for inspection at Westinghouse's Pittsburgh offices. Defendants claim these statements fail to meet the requirements of paragraph 5 of Joint Pretrial Order No. 5, which requires Westinghouse to specify "the procedures it followed in ascertaining that identical copies of such foreign documents, including handwritten notations, marginalia and attachments, have been produced from files maintained in the United States . . ." In addition, they contend that Westinghouse has ignored the additional requirement that a party must identilfy the foreign documents that were not produced if copies of those originals were produced from its U.S. files or state the circumstances that prevent such identification. In essence, then, these defendants suspect that Westinghouse's U.S. files are less complete than those in foreign countries, want more complete information to determine whether this is so, and then want access to any additional documents which are discovered.

Plaintiffs' and defendants' motions to compel thus rest on wholly different theories. With plaintiff's motions, the main issue is whether defendants should be ordered to produce withheld documents despite the prohibitions of foreign nondisclosure laws. With defendants' motions, the main issue is whether Westinghouse has withheld foreign documents, and that question turns on the sufficiency of the Daniels affidavit. Assuming such documents have been withheld, Westinghouse seems to have raised no objection to their disclosure. Because plaintiffs' mo-

tions raise the more complex issues and occupy the bulk of the voluminous papers which have been submitted to us, we shall discuss them first.

The parties have offered differing views on the proper standards to be applied in deciding whether to issue a production order for documents located in a country which prohibits their removal or disclosure. Plaintiffs argue that Rule 37 requires a bifurcated two-step procedure for compelling production and imposing sanctions. They contend that the question of whether a discovery order should issue is solely a matter of American law; foreign nondisclosure laws are only relevant in deciding whether sanctions should be imposed for non-compliance. Defendants argue that we should instead use a balancing test to consider all circumstances, including foreign law, before entering an order compelling discovery. We take a middle course between these opposing positions, finding that a number of factors must be considered before issuing a production order, but that the inquiry is not as comprehensive as defendants suggest.

At the outset, we should identify the type of jurisdiction exercised by a court in issuing an order to produce foreign documents. In the field of foreign relations law, two types of jurisdiction have been defined. Prescriptive jurisdiction refers to the capacity of a state under international law to make a rule of law. It is exemplified by the enactment of the Federal Rules of Civil Procedure, e.g., Rule 37. Enforcement jurisdiction, on the other hand, refers to the capacity of a state under international law to enforce a rule of law. When a court enters an order compelling production of documents under Rule 37, it exercises its enforcement jurisdiction. *Restatement, Second, Foreign Relations Law of the United States*, § 6 (1965); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. L. Rev. 487, 495 (1969).

The jurisdiction of American courts is unquestioned when they order their own nationals to produce documents located within this country. But jurisdiction is less certain when American courts order a defendant to produce documents located abroad, especially when the country in which the documents are situated prohibits their disclosure.

As a general rule, a court has the power to order a person subject to its jurisdiction to perform an act in another state. *Restatement, Second, Conflict of Laws*, § 53 (1971). There are two preconditions for the exercise of this power. First, the court must have personal jurisdiction over the person. Second, the person must have control over the documents. *United States* v. *First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *In Re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947). The location of the documents is irrelevant. 72 F. Supp. at 1020.

On the issue of control, there are certain corollary principles which apply to multinational corporations. The test for determining whether an American court can order an American parent corporation to produce the documents of its foreign subsidiary was stated in *In Re Investigation of World Arrangements*, 13 F.R.D. 280, 285 (D.D.C. 1952):

> If a corporation has power, either directly or indirectly, through another corporation or a series of corporations, to elect a majority of the directors of another corporation, such corporation may be deemed a parent corporation and in control of the corporation whose directors it has power to elect to office.

Thus, for example, if the parent owns more than 50% of the foreign subsidiary's stock, it possesses the necessary control. W. Fugate, *Foreign Commerce and the Antitrust Laws*, 116 (2d ed. 1973).

The test is less clear in situations where an order is directed to the American subsidiary of a foreign corporation to produce documents from its head office located abroad. One court has held that a subpoena duces tecum was enforceable if it was served on the subsidiary's offices in the United States, even though the corporation's board of directors had passed a resolution prohibiting the removal of the requested records from Canada and even though all the board members were residents of Canada. *In Re Grand Jury Subpoena Duces Tecum*, *supra*, 72 F. Supp. at 1020. The court's reasoning as to how the American officers had control over the withheld documents seems to rest on the theory that it was sufficient that the documents were in the possession of the corporation and that a subpoena had been served on some of its officers. *See Onkelinx*, *supra*, 64 Nw. L. Rev. at 505-06. More helpful guidance can be drawn from *Societe Internationale* v. *McGranery*, 111 F. Supp. 435, 440-42 (D.D.C. 1953), in which the court held that plaintiff, a Swiss corporation, had control over the papers of its Swiss-based bank, H. Sturzenegger & Cie.[3] The court attached significance to the fact that Sturzenegger was a director and officer of plaintiff and was "perhaps" a dominant personality in plaintiff's affairs. After an extensive examination of the corporate affiliations of the two partners, the court concluded that "through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control." 111 F. Supp. at 442. Thus, the issue of control is more a question of fact than of law, and it rests on a determination of whether the defendant has practical and actual managerial control over, or shares such con-

---

[3] The court's holding on the control issue was accepted both by the Court of Appeals, *Societe Internationale* v. *Brownell*, 225 F.2d 532, 536 (D.C. Cir. 1955), and by the Supreme Court, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 204 (1958).

trol with, its affiliate, regardless of the formalities of corporate organization.

Once personal jurisdiction over the person and control over the documents by the person are present, a United States court has power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power. This proposition has been accepted by both the American Law Institute (*Restatement, Second, Foreign Relations Law of the United States*, § 39[4]), and by the Supreme Court, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958). However, American courts should not ignore the fact that such a law exists. When two states, both having jurisdiction, prescribe inconsistent conduct, American courts have developed certain rules of self-restraint governing the appropriate exercise of their power. *United States* v. *First National City Bank, supra*, 396 F.2d at 901. Because *Societe Internationale* dominates the field and sets forth the pertinent considerations to be weighed when such conflicts arise, we analyze it at length.

The procedural context of the *Societe* case is intricate. A Swiss company brought a civil suit under the Trading with the Enemy Act to recover assets which the United States Government had seized during World War II as enemy-owned property. The American government challenged plaintiff's claim of ownership and also asserted that plaintiff itself was an "enemy" and hence was barred from recovery under the Act. To prove its defenses, the government moved for an order requiring

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[4] Section 39(1) states:

> A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.

plaintiff to produce documents held by its bank in Switzerland. The district court granted the motion. Plaintiff then sought to avoid production on the ground that disclosure of the bank records would violate Swiss penal laws and subject it to criminal sanctions. The defendant in turn moved to dismiss the complaint because of plaintiff's noncompliance with the production order.

The district court appointed a special master to consider plaintiff's claims. The master found that there was no evidence of collusion between plaintiff and the Swiss government to evade discovery, and that plaintiff had shown good faith in its efforts to secure waivers from the Swiss government and to comply with the order. The district court accepted these findings, but nevertheless dismissed the complaint with prejudice holding that plaintiff had control over the bank records, that the records "might prove to be a deciding factor in the outcome of this suit" (111 F. Supp. at 443), that Swiss law did not provide an adequate excuse for noncompliance, and that the court in these circumstances had the power to dismiss the complaint. Although plaintiff was given a grace period to continue its efforts to secure waivers from the Swiss government, and although it produced more than 190,000 documents over the next three years, plaintiff ultimately failed to achieve full compliance. Consequently, the district court directed a final dismissal of the action. The Court of Appeals affirmed.

On certiorari, the Supreme Court affirmed the issuance of the production order, but reversed the dismissal of the action. It is the first half of the Court's holding that is of primary concern to us here.

In deciding that the production order was justified, the Court first accepted the district court's finding that, apart from the effect of Swiss law, the documents were within plaintiff's control and possession. It then dicussed the

question of whether Swiss law barred the conclusion that plaintiff had "control" of the documents within the meaning of the Federal Rules of Civil Procedure governing discovery orders. The Court decided that Swiss laws did not create an insuperable obstacle to issuance of a production order.

The Court identified three salient factors which influenced its decision. First, in enacting the statute which formed the basis for plaintiff's action, Congress had expressed a "deep concern" with reaching property held by corporations whose intricate financial structure disguised their ties to enemy interests. The Court stated that a failure to order the production of documents illuminating plaintiff's financial background would frustrate this Congressional policy. We infer that the Court would accept the obverse proposition that a court should generally order production to effectuate strong Congressional policies. In addition, because the Court gave no hint that the disclosure policies of the American statute should be balanced against the secrecy policies of the Swiss law, it appears that the only pertinent inquiry is the strength of the American interests. Second, the Court noted that the requested records were "vital" to a determination of the pivotal statutory inquiry, namely whether plaintiff was the captive of enemy interests. The Court thus suggested that the normal discovery standard of whether a document is relevant or is calculated to lead to the discovery of admissible evidence does not apply, and should be replaced by the higher standard of whether the requested documents are crucial to the resolution of a key issue in the litigation. Third, in apparent reliance on plaintiff's status as a Swiss national invoking the prohibitions of its own country's penal laws, the Court stated that plaintiff was in a favorable position to secure a waiver of those laws from its government or to explore alternative procedures for achieving compliance. The opinion thus suggests that the greater the chances for flexibility in a country's application of its

nondisclosure laws, the greater the likelihood that a production order should issue. In conclusion, the Court stated that "United States courts should be free to require [persons such as plaintiff] . . . to make all such efforts [at compliance] to the maximum of their ability . . ." 357 U.S. at 205.

In the next paragraph, however, the Court explicitly confined its ruling to the case before it, thus weakening the precedential value of its three-pronged analytical framework. The propriety of issuing a production order in other cases was said to depend not only on those three factors, but also on the "exigencies of particular litigation" and "the circumstances of a given case." 357 U.S. at 206. These circumstances and exigencies were not defined with any particularity.

Although the Court by this language seemingly endorsed a completely open-ended approach for deciding future cases, the overall tenor of the opinion and several additional comments lead us to conclude that the Court envisioned some limits on its inquiry. First, in summarizing its holding that the district court properly issued the production order, the Court mentioned only two interests which were to be factored into the decisionmaking process: a) the requirements of the procedural rule authorizing production orders, and b) the policies underlying the law which formed the basis for the action. 357 U.S. at 206. The first of those interests encompasses the questions of defendant's control over the documents and plaintiff's need for them. The other is confined to the importance of the policies behind the American law. Second, the next section of the opinion contains language which reserves certain factors for consideration solely at the sanctions phase of the enforcement process. In that section, the Court explored the source of a federal court's power to dismiss a complaint because of noncompliance with a production order, and decided that it rested solely

on Rule 37, F.R.Civ.P. The Court then found that a district court's Rule 37 power is invoked when a party "refuses to obey" such an order, and that refusal occurs whenever a party fails to comply with an order, regardless of its reasons for noncompliance. This analysis is followed by this sentence:

> Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant *only* to the path which the District Court might follow in dealing with [a party's] failure to comply. 357 U.S. at 208. (Emphasis supplied.)

Although this sentence does not explicitly remove defendant's reasons for noncompliance from consideration at the order-making stage of the proceedings, it impliedly has that effect, because we are told such reasons are relevant *only* to the question of appropriate sanctions.

This conclusion is confirmed by the third section of the *Societe* opinion, in which the Court examined whether plaintiff's stated reasons for noncompliance were adequate to prevent dismissal of its complaint under Rule 37. The Court first determined that plaintiff "had in good faith made diligent efforts to comply with the production order," then found that those efforts fell short of full compliance, and then analyzed the shortfall to see whether it was caused by plaintiff's "inability fostered neither by its own conduct nor by circumstances within its control."

In defining acceptable forms of inability, the Court discussed a number of issues that the parties in the present case have attempted to raise prematurely at the order-making stage. One such issue is whether defendants "deliberately courted legal impediments" in a foreign country to evade discovery, such as by requesting a foreign government to adopt a nondisclosure law and

then shipping its records to that jurisdiction. Another is the severity of the sanctions imposed for violation of the nondisclosure law and the resulting hardship to defendants. In this vein, the Court noted that "fear of criminal prosecution constitutes a weighty excuse for nonproduction . . ." A further issue concerns the scope and applicability of the foreign laws, since a refusal to produce which rests on an overbroad and unjustified interpretation of the foreign laws will not be honored here. On this question the Supreme Court stated that "the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws."

The wisdom of deferring consideration of these factors until the sanctions phase of the proceedings is clear. In the present case, each defendant seeks to differentiate itself from its co-defendants on the basis of a variety of factors, including the volume of the documents it is withholding, the extent of its culpability in securing passage of the foreign laws, its good faith in seeking to comply with document requests, the amount of hardship it might suffer by disclosure, and the breadth of its interpretation of foreign laws. Each defendant asks for separate treatment and consideration. A decision to grant or withhold a production order under Rule 37(a) does not provide a means for tailoring relief to the individual circumstances of each defendant. On the other hand, Rule 37(b) is flexible and offers a variety of sanctions, if necessary, which the court may incorporate into such orders "as are just."

The Supreme Court in *Societe* recognized the validity of this approach. Although it found that the district court was unjustified in dismissing plaintiff's complaint, it remanded the case with instructions that the district court "possesse[d] wide discretion to proceed in whatever manner it deems most effective." That discretion included options to "explore plans looking towards fuller compliance," and even to "draw[] inferences unfavor-

able to [plaintiff] as to particular events." This language indicates that a production order is only the first step in the process of resolving discovery disputes, and that it should not be prematurely burdened by a comprehensive inquiry into all ramifications of the controversy.

To summarize the preceding discussion, we have concluded that we possess the power to enter an order against defendants under Rule 37(a) compelling them to produce documents located abroad if the particular defendant is within the personal jurisdiction of this court and has control over the requested documents. *Societe* teaches that the decision whether to exercise that power is a discretionary one which is informed by three main factors: 1) the importance of the policies underlying the United States statute which forms the basis for the plaintiffs' claims; 2) the importance of the requested documents in illuminating key elements of the claims; and 3) the degree of flexibility in the foreign nation's application of its nondisclosure laws. Relying on the Court's additional suggestion that each case must depend upon its particular facts, several defendants urge that we consider several other factors that we have not yet discussed. However, in the circumstances of this case, we find that these other factors are of limited or no utility.

Several defendants cite the *Restatement, Second, Foreign Relations Law of the United States*, § 40(a) or rely on broad notions of "international comity" for the proposition that we should balance the vital national interests of the United States and the foreign countries to determine which interests predominate. Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests

here display an irreconciliable [sic] conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

All defendants rely on a line of Second Circuit cases which were decided after *Societe* and which suggest that a district court should not order production if the order would cause a party to violate a foreign law. *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959); *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960); *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962). Plaintiffs rely in turn on a Tenth Circuit decision which takes a contrary view. *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976). We believe that the Tenth Circuit decision is more closely in harmony with the principles established in *Societe*.

Gulf and Uranerz urge that the production orders sought by plaintiffs are barred by the act of state doctrine because they would interfere with the conduct of our foreign relations by the Executive Branch. However, the act of state doctrine is not applicable here. That doctrine bars an American court from questioning the validity of the act of a foreign sovereign when that act is done within the sovereign's territory. *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964). Plaintiffs

have not challenged the validity of any of the foreign nondisclosure laws which are relied on by defendants. The issue is not whether those laws are valid, but rather, conceding their validity, whether they excuse defendants from complying with a production order.

Many defendants ask us to consider communications from foreign governments to the U. S. State Department which have protested the issuance of production orders by American courts in similar circumstances. We believe those communications are relevant to the decision whether to issue a production order only insofar as they indicate the degree of accommodation or adjustment which the foreign government may be willing to make in its nondisclosure laws. We reserve any further consideration of these communications to the hearing on sanctions, if that becomes necessary.

Finally we have on this question—as we have on another question [5]—been benefitted with statements amici curiae from the Governments of Canada, Australia, South Africa and Switzerland. By far the most extensive of these is the Canadian statement which urges that we defer to the critical importance which Canada attaches to its national policies and regulations. But as we have earlier observed a balancing test is inherently unworkable in this case, and were it not we would be hard pressed not to accede to the strong national policy of this country to enforce vigorously its anti-trust laws.

There are two procedural hurdles we must clear before we reach the merits of the various motions to compel. The issues are ones of waiver and collateral estoppel.

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[5] Here the amici appear in support of the non-defaulting defendants. On the question of the timing of the hearing to prove up damages on the default judgment, which is now before the Court of Appeals, the amici have supported the defaulting defendants.

TVA argues that Uranerz and Noranda have waived certain foreign law objections by failing to raise them in a timely manner. As to Uranerz, we previously ruled on January 29, 1979 that Uranerz, because of its delinquency in asserting objections, had waived all objections to production *except* those objections based on the Canadian non-disclosure laws. We created this exception after learning that many other defendants had raised foreign law objections, that the issue was unusually sensitive and important, and that neither side had moved for a resolution of the issue. In those circumstances, we ruled that it would be unfair to deprive Uranerz of the opportunity to raise the foreign law objection.

Noranda's situation is somewhat different. Noranda initially objected to TVA's document requests on the basis of Canadian nondisclosure laws. However, when it later defined its foreign law objections in accordance with Pretrial Order No. 5, Noranda added a new objection based on Australian law. TVA challenges the Australian law objection as untimely, because it was not raised in response to the document requests and because the pretrial order did not expressly authorize new objections. We think TVA's interpretation of the pretrial order is too narrow. The order was drafted in response to the delays and difficulties in document production which first surfaced in the Uranerz situation, and was specifically intended to provide the final deadline for particularized foreign law objections to all prior and pending document requests. All objections filed within the time limits of the order are proper.

Rio U.S., Noranda and Uranerz contend that plaintiffs are collaterally estopped from litigating their present motions because the Tenth Circuit decided the same issues adversely to them in *In Re Westinghouse Electric Corporation Uranium Contract Proceedings*, 563 F.2d 992 (10th Cir. 1977). That case was a by-product of the related Virginia contracts litigation, where Westing-

house was sued for breach of its uranium contracts by thirteen utility companies, including TVA. In an effort to prove its defense that the real cause of its inability to perform was a price-fixing conspiracy among uranium producers, Westinghouse served a subpoena on Rio U.S., a non-party, in Utah. The subpoena directed Rio U.S. to produce certain business records. Rio U.S. raised the Canadian nondisclosure laws as a bar to production and moved to quash the subpoena. The district court denied the motion and entered a production order. After Rio U.S. failed to comply, it was adjudged in contempt and was fined $10,000 per day until it complied with the order. The Tenth Circuit reversed, holding that "all things considered, on the basis of the record before it, the district court in our view abused its discretion in adjudging Rio [U.S.] to be in contempt of court, and in imposing the severe sanction in connection therewith." 563 F.2d at 996.

We do not believe that the court's decision constitutes an estoppel to plaintiffs' present motions. TVA never appeared in the Utah proceedings, and therefore never had a full and fair opportunity to litigate the issues. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Its position as a party plaintiff in the Virginia litigation, in which it was Westinghouse's adversary, gave it no meaningful incentive to intervene in Westinghouse's efforts to secure discovery on Westinghouse's cartel-related defenses. Although Westinghouse did have a full opportunity to litigate the issues, those issues are not the same as those raised here. The only issue on appeal was the propriety of the sanctions imposed for noncompliance, not the validity of the production order. Therefore, that decision offers no conclusive guidance on the issue of whether a production order should issue here. Furthermore, the decision whether to impose sanctions rests on a variety of factors, and those factors have been restructured in this

case by Rio U.S.'s status as a party rather than a witness, by the more crucial relevance of the requested documents to plaintiffs' antitrust claims, and by our opportunity to have a much more complete record on Westinghouse's charges of a collusive attempt to evade discovery and of overall bad faith.[6]

We now examine whether all defendants are within the personal jurisdiction of this court and have control over the requested documents, so that we possess the requisite power to issue an order under Rule 37(a) compelling production of their foreign documents. Only Noranda has raised an objection based on lack of *in personam* jurisdiction. Five defendants—Engelhard, Noranda, Denison U.S., Rio U.S. and Uranerz—deny that they control the requested documents.

Noranda has moved to dismiss both the Westinghouse and the TVA actions for lack of personal jurisdiction. Both motions have been deferred pending discovery. Noranda argues that no production order can be entered until we rule upon the motions. We disagree, because even in the absence of such a ruling, we possess jurisdiction to determine our jurisdiction over the parties. In the exercise of that jurisdiction, we may compel discovery to aid our resolution of the personal jurisdiction issues.

Noranda admits that it has interposed foreign law objections to production of several documents which are directly relevant to its contacts with Illinois: 1) the content of a document regarding the seminar of the Atomic

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[6] Of course, a more complete record is of no consequence for collateral estoppel purposes if Westinghouse could have developed the same facts against Rio U.S. in the earlier litigation. It appears, however, that some additional facts have only recently been made available (e.g. the grand jury documents) or relate to subsequent events (e.g. later efforts to secure waivers from the foreign governments).

Industrial Forum in Oak Brook, Illinois in 1973, and 2) documents concerning contacts with two Illinois utilities. Noranda seeks to nullify the usefulness of these documents by making self-serving and uncorroborated assurances that they do not establish its contacts with this state. Plaintiffs are not required to accept these assurances, and are entitled to make their own inspection of the documents. *Societe Internationale* v. *McGranery*, *supra*, 111 F. Supp. at 442.

Noranda makes the alternative contention that we should limit discovery to those documents relevant to the jurisdictional issues. While we agree with this statement as a general principle, that principle offers little assistance where, as here, the jurisdictional and merits discovery is intertwined. Because the documents withheld pursuant to foreign law are peculiarly likely to impact on both areas, and because any segregation of documents will likely involve the unreviewable discretion of the party segregating and withholding them, we believe an order requiring full production is necessary.

To resolve the issue of whether four defendants control the requested documents, we must delve into the details of their corporate affiliations. Rio U.S. and Denison U.S. are the American subsidiaries of foreign parents, Engelhard is an American parent with foreign subsidiaries, and Noranda is a foreign parent with foreign and domestic subsidiaries.

Engelhard is a Delaware corporation with its principle place of business in New York City. Although it does not mine or produce uranium, it has acted as a sales representative for Nuclear Fuels Corporation of South Africa (Nufcor, a defaulting defendant) in promoting its sales of uranium in North America. In carrying out that function, Engelhard has been assisted by three wholly owned subsidiaries located in Australia and South Africa. Derby and Co. (South Africa) Pty., Ltd. is a

South African corporation which is a wholly owned subsidiary of Derby and Co., Ltd. (London), which in turn is a wholly owned subsidiary of Engelhard. Derby-South Africa transmitted information between Nufcor's offices in South Africa and Engelhard's offices in the United States. Philipp Brother (Australia) Pty., Ltd. is an Australian corporation which is a wholly owned subsidiary of Engelhard. Derby and Co. (Australia) Pty., Ltd. is an Australian corporation which is a wholly owned subsidiary of Derby-London. The Australian subsidiaries have aided Engelhard in its unsuccessful attempt to act as a sales representative for a newly-developing Australian mining company, Queensland Mines, which is also a defaulting defendant. Engelhard states that "it is possible that one or more of these subsidiaries may have within its possession, custody or control documents or information responsive to portions of [plaintiff's] document requests . . ." Engelhard has refused to produce those documents.

It is clear that Engelhard's total ownership of its Australian and South African subsidiaries gives it effective control over those corporations' documents. Engelhard's only argument to the contrary is that the normal inference of control is rebutted here because Engelhard has no legal right to direct the officers and employees of its foreign subsidiaries to violate the non-disclosure laws of their countries. The Supreme Court specifically rejected that argument in *Societe*, after it weighed the argument in light of the three factors we have identified above. 357 U.S. at 204-06. We reach the same conclusion, but postpone our analysis for a consolidated discussion of all defendants' arguments on this issue. See pp. 35-41 below.

Noranda is a Canadian corporation with its principal place of business in Ontario. Noranda itself does not own uranium or uranium-producing properties and has

not sold uranium. However, it owns 43.8% of the common shares of Kerr-Addison Mines, Ltd., a Canadian corporation which has a wholly owned subsidiary called Agnew Lake Mines, Ltd., which in turn owns a 90% interest in a uranium-producing mine in Ontario, Canada. Kerr-Addison's shares are publicly traded on the Toronto Stock Exchange and are owned by more than 11,000 shareholders. While a minority of the directors of Kerr-Addison are also officers of Noranda, Kerr-Addison keeps its own books and records and holds its own corporate meetings separate and apart from any other company. Noranda also has wholly owned subsidiaries that own uranium prospects located in Canada, Australia and the United States. One of these is Noranda Australia, Ltd., which has an interest in undeveloped uranium deposits in Australia. In addition, personnel of Noranda Sales Corporation, Ltd., a wholly owned Canadian subsidiary, have consulted with purchasers or prospective purchasers of uranium at various times in an effort to sell uranium to be produced in the future. These facts, as disclosed by affidavits in support of Noranda's motion to dismiss, reveal that Noranda has control over responsive documents of Noranda Australia and Noranda Sales, but not over those of Kerr-Addison.

The situation with Rio Algom Corporation (Rio U.S.) is much more complex than either Noranda or Engelhard. Rio U.S. is a Delaware corporation with its principal place of business in Moab, Utah, where it owns and operates a uranium mining and milling facility. Rio U.S. is the wholly owned subsidiary of Atlas Alloys, Inc., an Ohio corporation, which in turn is the wholly owned subsidiary of Rio Algom, Ltd. (Rio Canada), a Canadian corporation which mines and sells uranium produced from its Elliott Lake mine in Canada. Rio U.S. has appeared in this action and defended itself, but Rio Canada has defaulted.

Rio U.S. states that it has withheld no documents in its possession, custody and control, including documents from files located in Canada, on the ground that they are affected by foreign law. However, it has declined to produce certain other documents located in Canada because those documents are in the possession, custody and control of its parent once removed, Rio Canada, and because production of those documents would violate Canadian law. Westinghouse has sought to define an overlap or gray area of documents falling between these two statements. Westinghouse argues that Rio U.S. has unjustifiably refused to produce responsive documents concerning its uranium mining, marketing and exploration activities, because even though those documents are located in Canada in the files of Rio Canada's directors, officers and employees, those persons at all pertinent times acted in behalf of Rio U.S. and had responsibility for those uranium activities.

In support of this contention, Westinghouse has submitted extensive evidence that Rio U.S. and Rio Canada have operated as a single functional unit in all aspects of their uranium business. These two corporations have shared an interlocking structure of corporate directors, officers, and executive and administrative personnel who have managed the uranium-related activities of both corporations. The intervening ownership interest of Atlas Alloys is wholly collateral to the managerial unity of the two companies. Numerous officers of Rio U.S. have held dual positions with Rio Canada, enabling them to perform identical uranium-related functions for each corporation. For example, George Albino, in his capacity as principal operating officer of both corporations from 1971 to 1977, exercised direct managerial control over the daily uranium operations of both companies. Nine of Rio U.S.'s current officers and directors have offices at the corporate headquarters of Rio Canada in Toronto, Ontario. In January, 1976, A. G. Lowell, who is a Rio

Canada Vice-President, stated that "Rio Algom Corporation is wholly owned by Rio Algom Ltd., and all marketing matters related to uranium and other mineral products are handled from our Toronto office." Other evidence demonstrates that Rio U.S. and Rio Canada have been treated as a single uranium business not only by themselves, but by other members of the uranium industry and by their ultimate parent, Rio Tinto Zinc Corporation, Ltd.

From the available evidence of coordinated uranium-related activities, we conclude that there is a strong likelihood that Rio U.S. is withholding responsive documents in the files of Rio Canada personnel who have had and/or continue to have responsibility for Rio U.S.'s mining and marketing of uranium. To defend this withholding, Rio U.S. relies on cases involving a corporation's liability for a related corporation's actions. However, there is a crucial distinction between ability to compel production of documents and liability for a subsidiary's acts. The latter may require Rio U.S. to actually control or manage Rio Canada's business, but the former does not. W. Fugate, *Foreign Commerce and the Antitrust Laws, supra* at 116. It is sufficient that Rio U.S. has, or once had, control over its directors, officers and employees who managed the uranium-related activities of Rio U.S. alone or of both corporations. Rio U.S. must produce all responsive documents held by those employees or former employees, even if those documents have found their way into Rio Canada files. The formalities separating the two corporations cannot be used as a screen to disguise the coordinated nature of their uranium enterprise.

A similar situation may exist with respect to defendant Denison Mines, Inc. (Denison U.S.), but Westinghouse has provided insufficient documentation for us to conclude that Denison U.S. controls withheld documents

in the files of its parent defendant Denison Mines, Ltd. (Denison Canada). Denison Canada is a Candian corporation with its principal place of business in Toronto and engages in the mining, milling and sale of uranium. Denison U.S. is a Delaware corporation with its principal place of business in Denver, Colorado and is a wholly owned subsidiary of Denison Canada. Denison U.S. is and has been engaged in exploration for uranium and other minerals in the United States. Answer, ¶¶ 17, 18. Both corporations have appeared in this action.

Like Rio U.S., Denison U.S. states that it has raised no objections based on foreign law and has produced all documents within its control. Indeed, Denison U.S. allowed plaintiffs to walk through their entire files and select documents without regard to relevancy standards, with the exception of documents covered by the attorney-client privilege or work product immunity. However, Denison U.S. has been silent on the question of whether some of its documents were generated in Canada and have been kept there. Westinghouse suggests that these documents have been and are now held by Denison Canada and that the close managerial connections between the two corporations justify the issuance of an order directing the production of all such documents reflecting management decisions of Denison U.S. But Westinghouse's exhibits on this issue (Nos. 61 and 62) are too scanty to support this inference. Consequently, Westinghouse's motion to compel Denison U.S. to produce documents from the files of its parent Denison Canada must be denied.

Uranerz raises a control issue of a completely different character. Its documents are located primarily in its corporate offices in Canada and West Germany, and Uranerz raises no control objections as to them. But an undisclosed volume of Uranerz documents is currently located in the offices of the Ministry of Energy, Mines

and Resources of the Canadian government in Ottawa. Those documents were transferred in November, 1976, after the Canadian government directed Uranerz and other companies to deposit with the Ministry all documents covered by the Canadian nondisclosure laws which had been enacted in September of that year. When Uranerz's American counsel, Mr. Levitt, later asked the Ministry if he could review the documents, he was advised that no American counsel for any company has been permitted to inspect any documents in the Ottawa depository. Levitt was informed that his request would not even be considered unless he could furnish a written opinion that he could not be compelled by any American court to disclose what he had seen. In his view, American law did not provide such an airtight safeguard against disclosure that he could give such assurances. Therefore Mr. Levitt abandoned his efforts to seek access to these documents. Because these documents are in the actual possession of government officials, and because those officials have demonstrated that access is strictly limited and is to be granted on a discretionary basis, we agree with Uranerz that it has no control over those documents. *Compare Societe Internationale, supra,* 357 U.S. at 204.

We have now determined that, with certain exceptions regarding Denison U.S. and Uranerz, we have the power to issue a production order under Rule 37(a) against the eleven resisting defendants that are the subjects of plaintiffs' motions. The remaining question is whether we should exercise our discretionary power to issue those orders, after weighing the three factors described earlier in this memorandum. We conclude that we should.

The first consideration is the strength of the Congressional policies underlying the statute which forms the basis for plaintiffs' action. Plaintiffs' complaint challenges activities by the defendants which, if true, would constitute massive violations of this nation's antitrust

laws. "These laws have long been considered cornerstones of this nation's economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court." *United States* v. *First National City Bank*, 396 F.2d 897, 903 (2d Cir. 1968). "They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). More specifically, Congressional concern with the very practices at issue here, and with the antitrust implications of those practices, is evidenced by extensive subcommittee investigations into the alleged international uranium cartel. *See Hearings Before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977). Governmental concern with this issue achieved choate form when the Justice Department convened a grand jury which eventually charged Gulf with criminal antitrust violations arising out of the same transactions identified by Westinghouse. *United States* v. *Gulf Oil Corp.*, Cr. No. 78-123 (W.D. Pa. 1978). The existence of this public enforcement action does not supplant plaintiffs' private civil action. Indeed, Congress specifically intended to encourage civil antitrust actions by allowing private litigants to gain certain estoppel advantages from government antitrust actions. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). From these indicators, it is clear that the policies supporting an inquiry into corporate activities and structure are at least as weighty, and probably stronger, with the antitrust statutes here than they were in the Trading with the Enemy Act in *Societe Internationale*. *See* W. Fugate, *supra* at 122.

The second consideration is whether the requested documents are crucial to the determination of a key issue in the litigation. Plaintiffs' showing on this factor is simply overwhelming. All of the discovery requests now

at issue are directly relevant to a number of fundamental issues in the complaint, answers, affirmative defenses and counterclaims in this litigation. Plaintiffs seek vital information relating to, among other things, the time period when the alleged conspiracy of uranium producers was carrying out its activities, defendants alleged efforts to conceal their conspiracy, the impact of that alleged conspiracy on United States interstate and foreign commerce, the defendants' defenses of sovereign compulsion, and information on uranium sales and market conditions. Plaintiffs have submitted voluminous exhibits which give a sketchy picture strongly supporting their allegations in these areas but also suggesting that there are larger gaps in defendants' document production.

The strength of plaintiffs' need for these documents is perhaps best demonstrated by these facts. First, Gulf has admitted the "establishment of an international uranium cartel under which price controls and market allocations were established" for at least some sales of uranium. (Gulf Brief, p. 18). Second, the information which plaintiffs seek is of such exceptional significance that the three foreign governments have sought to authorize defendants to withhold that information for the express purpose of frustrating United States judicial inquiries into the activities of this cartel. Third, ten defendants have withheld documents under their control which are said to be within the scope of the secrecy legislation. The inevitable inference is that the withheld information is likely to be the heart and soul of plaintiffs' case.

Several defendants counter that the unproduced documents are merely cumulative of presently available discovery (Gulf, pp. 56-57) or that their own examination of the documents has convinced them that they have little significance to the case (Federal, pp. 14-15). These arguments were persuasively rejected by the district court in the *Societe Internationale* litigation:

> Under the rules of United States Courts a party is not required to accept the assurance of opposing counsel as to what has been made available. He is entitled to draw his own conclusions on examination of the papers. 111 F. Supp. at 442.

Other defendants argue that they are equally prejudiced by the nondisclosure laws, since they may be prevented from using exculpatory documents which are covered by those laws. (*See, e.g.* Noranda, pp. 24-25). However, the solution to this "problem" lies in the fullest possible disclosure, not in a mutual limitation on relevant information.

Finally, we recognize that, as one commentator has put it, "the heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case." Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l. L. 747 (1974). That is especially true when plaintiffs allege an antitrust conspiracy which has taken deliberate and elaborate steps to cloak its activities. "If true, the nature of the activities must be ferreted out of dark and obscure corners." *Societe Internationale, supra*, 111 F. Supp. at 443. The documents at issue here are crucial to plaintiffs' proof.

The third consideration involves an appraisal of the chances for flexibility in a country's application of its nondisclosure laws. The degree of leniency in the application of the nondisclosure laws varies from country to country. South Africa has taken the most flexible position. It has allowed Westinghouse to inspect Utah's uranium-related documents in that country, and is currently considering a request from Engelhard to allow a similar inspection of its documents. Australia has rejected all past requests for a waiver of its regulations,

but interprets its laws as authorizing the Attorney General to grant such waivers. The Attorney General is presently considering requests for waivers from Engelhard, Getty and Utah. Canada has taken a completely inflexible position. It has consistently rejected all requests for waivers, stating that its government officials have no authority to grant them. It has opposed Westinghouse's unsuccessful efforts to secure letters rogatory from a Canadian court for production of uranium-related documents. It has rejected all requests to modify or amend the regulations and has refused to give any assurances of non-prosecution for any violations. Canada has also sent numerous diplomatic notes to the U.S. State Department in which it has expressed a firm position that any disclosure of documents covered by its regulations would be inimical to its national interests. Canada's position has not been relaxed by its amicus submission.

On balance, we have concluded the issuance of Rule 37(a) orders is required. The entry of such orders may lead to a further narrowing of the defendants' foreign law objections. That process has already been evidenced by the increased disclosures which have occurred since Westinghouse filed the present motions. Even if some defendants subsequently conclude, as they now suggest, that they have already done everything within their powers to comply with such an order, we do not think an order at this time would be a futile gesture. The order will serve to declare Westinghouse's right to the discovery it seeks, thereby framing the competing interests of the United States and the foreign governments on a plane where the potential moderation of the exercise of their conflicting enforcement jurisdictions can be meaningfully considered. We do not seek to force any defendant to violate foreign law. But we do seek to make each defendant feel the full measure of each sovereign's conflicting commands, so that, in the words of Chief Judge Kaufman of the Second Circuit, it now

> "must confront' . . . the need to 'surrender to one sovereign or the other the privilege received therefrom' or, alternatively, a willingness to accept the consequences."

United States v. *First National City Bank*, 396 F.2d 897, 905 (2d Cir. 1968).

Accordingly, plaintiffs' motions to compel Utah, Gulf, GMCL, Noranda, Denison Canada, Engelhard, Getty, Federal, and Rio U.S. to produce foreign documents are granted in their entirety and are granted in part and denied in part as to Uranerz and are denied as to Denison U.S. Defendants' alternative objections to production of foreign documents on grounds such as attorney-client privilege and overbroad definitions are reserved for ruling at such time as defendants announce their ability to comply with this order. Production hereunder to be made on or before January 2, 1980.

The motions of defendants Getty, Gulf and Utah to compel Westinghouse to comply with Pretrial Order No. 5 are granted in part and Westinghouse is directed to provide defendants with a list identifying the foreign documents which it has produced from its domestic files.

ENTER:

/s/ Prentice H. Marshall
PRENTICE H. MARSHALL
United States District Judge

Dated: November 7, 1979.

APPENDIX F

EXCERPTS FROM MARCH 26, 1980
TRANSCRIPT OF PROCEEDINGS
IN NORTHERN DISTRICT OF ILLINOIS
CASE NO. MDL 342, pp. 11-12

* * * *

[11] THE COURT: My friend, I want to tell you one thing: I am not going to change the scheduling of this case with the rise and fall of the Canadian Government or any other common- [12] wealth government. We have stayed our hands. We have deferred to them. And we are not going to do it anymore.

So from now on, if you want to make that argument, put it in writing, make it on the record, but don't take up my time with it.

And you may transcribe these remarks and you may transmit them to the Government of Canada, Australia, Great Britain and South Africa.

* * * *

THE COURT: I hope that Trudeau has more sense than Clark, but I doubt it, because he was there before Clark.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE*

The Government of Canada hereby appears as *amicus curiae*, responding to this Court's invitation to express its views on the relief sought in pending discovery motions filed by Tennessee Valley Authority (TVA) and Westinghouse Electric Corporation (Westinghouse). The motions in question urge this Court to compel parties to

this lawsuit to produce documents and information in contravention of the Canadian Uranium Information Security Regulations (Regulations).[1] The Government of Canada respectfully submits that the course of judicial action urged by movants would violate established principles of international comity embraced by United States law.

Part I of this brief (and Attachments A-D)[2] sets forth pertinent background facts, focusing particularly on the critical importance that Canada attaches to those national policies and laws underlying the present dispute. Part II of this brief discusses the applicable legal principles that compel the conclusion that this Court should defer to Canadian law.

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[1] The deference to be accorded to the Regulations appears to be at issue in TVA's motions directed to Uranerz, Noranda Mines, Rio Algom, Gulf Oil and Gulf Minerals Canada, Ltd., and in Westinghouse's motions directed to Rio Algom, Federal Resources, Getty Oil, Gulf Oil, Gulf Minerals Canada, Ltd., Noranda Mines and Denison Mines. The Court also has before it similar issues relating to Swiss, South African and Australian law. Further, we are informed that the United Kingdom, acting under its Shipping Contracts and Commercial Documents Act of 1964, has prohibited Rio Tinto Zinc, Ltd. from disclosing documents related to the international uranium marketing arrangement.

[2] Attachment A is an October 14, 1977, press release issued by Hon. A. W. Gillespie, the Canadian Minister of Energy, Mines and Resources at that time, attaching (*inter alia*) the text of the Regulations and various pertinent diplomatic communications; Attachment B is a March 15, 1978 diplomatic note (No. 116) from Canadian Embassy to U.S. Department of State; Attachment C is Canada's *amicus curiae* brief filed on April 17, 1978, in the United States Supreme Court in connection with *General Atomic Co.* v. *Felter*, 436 U.S. 904 (1978); Attachment D is a November 8, 1978 diplomatic note (No. ECP-25) from Hon. Donald Jamieson, Canadian Secretary of State for External Affairs, to Mr. Thomas Enders, the United States Ambassador to Canada.

I. *Background Facts*

Canada's uranium resource industry expanded vigorously through the 1950's, largely to meet United States demands. In the 1960's, the United States government took actions aimed at protecting its domestic uranium producers, and effectively closed the large United States market to Canadian and other foreign uranium producers. These American actions threatened the survival of the entire Canadian uranium industry, thereby imperilling Canada's National Security and vital economic interests.

In an effort to minimize the disruptive effects threatened by United States policies, the Canadian government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangement. Canadian government statements reflect its involvement in this arrangement:

> During the early 1970's the Canadian government tried to elicit consuming nation support for the uranium industry and its dependent mining communities . . . . Lacking support from consuming nations, and convinced that a viable nucleus of the producing industry was essential in the light of all projections of future demand, the Canadian government initiated discussions with producing nations which led ultimately to an informal marketing arrangement among non-U.S. producers. Att. A, Statement dated September 22, 1976.
>
> The Canadian Government . . . initiated the discussions which led to an informal marketing arrangement among non-U.S. producers. The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preser-

> vation of a viable uranium producing industry was essential to the Canadian national interest in the light of projections of future uranium requirements. The long history of close Canadian Government involvement in and regulation of the uranium resource industry clearly establishes the degree to which the government regards the industry as vital to Canadian interests and the importance it consequently attaches to industry compliance with Government policy respecting uranium marketing. Att. D at 2.

The purpose of the international marketing arrangement was to allocate the meager non-U.S. demand among the non-U.S. producers, and to stabilize prices for a transitional period.[3] The arrangement did not apply to sales to consumers in the participating countries and in the United States. The marketing arrangements were discontinued in 1975. During 1972-75, however, the participation of all Canadian uranium producers in this marketing arrangement was a matter of firm Canadian government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and Regulations. This policy, which was defensive in nature and temporary in application, was considered to be in the vital national interest of Canada.

Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of

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[3] The Canadian government, which had previously objected through diplomatic channels to the United States foreclosure of its uranium market, promptly advised the American government of the initiation of the marketing arrangement. See Att. A, Note No. 210, August 4, 1969; Aide-Memoire of July 24, 1970; Note 359, December 3, 1971; February 14, 1972 letter from H.C. Armstrong to A.S. Freidman.

Canadian government policy. Accordingly, when it became clear that documents located in Canada bearing on the international uranium marketing arrangement might be removed to the United States in response to proceedings there, the Canadian government promulgated the Uranium Information Security Regulations, on September 23, 1976. The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies.[4]

The pertinent terms of the Regulations[5] are as follows:

> No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 in-

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[4] Westinghouse has flagrantly misrepresented the position taken by Joseph S. Stanford in a 1978 law review article, suggesting that Mr. Stanford stated that the Regulations were promulgated to provide an *ex post facto* cloak for a commercially motivated combine. Westinghouse Mem. at 27. In fact, in that article Mr. Stanford affirmed the national interests that led to passage of the Regulations. (Mr. Stanford, formerly legal officer in the Canadian Department of External Affairs, was expressing his personal views). Westinghouse's misrepresentations of Mr. Stanford's remarks (Westinghouse Mem. at 25, 27) may be compared with the actual text of his article, which is entry 23 in the Appendix to the Memorandum of Gulf Oil Company and Gulf Minerals Canada, Ltd.

[5] P.C. 1976-2368, amended by P.C. 1977-2923 as of October 13, 1977.

> volving that person or any other person in relation to the exporting from Canada or marketing for use outside of Canada of uranium or its derivatives or compounds, shall (a) release any such note, document or material, or disclose or communicate the contents thereof . . . unless . . . (ii) he does so with the consent of the Minister of Energy, Mines and Resources.[6]

The two Canadian court decisions which have considered these Regulations have upheld their validity.[7] Substantial criminal penalties are provided in the event that the Regulations are violated.[8]

It has been the continuing and oft-stated policy of the Canadian government to enforce these Regulations. Thus, the Canadian government opposed an application for letters rogatory seeking information covered by the Regulations,[9] and the Minister of Energy, Mines and Resources has refused all applications for exemptions or

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[6] While the Regulations provide for waiver of the prohibition by the Minister, the High Court of Ontario on November 10, 1977, struck down the authority of the Minister to grant such dispensations. *Re Clark et al. and Attorney General* 81 D.L.R. [3d] (Ont. High Ct. 1977). Since that time no Canadian official has had the authority to waive the terms of the Regulations. The Regulations also provide, in Section 3(a)(i), an exception for disclosure of documents or information when required by or under a law of Canada.

[7] *Re Clark et al. and Attorney General* 81 D.L.R. [3d] (Ont. High Ct. 1977); *Re Westinghouse Electric Corporation and Duquesne Light Co. et al.* 78 D.L.R. [3d] (Ont. High Ct. 1977).

[8] The maximum penalty for violation of the Regulations is imprisonment for up to five years and a fine not exceeding ten thousand dollars. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

[9] *Re Westinghouse Electric Corporation and Duquesne Light Co. et al., supra.*

other relief from the terms of the Regulations which involved documents bearing upon the international marketing arrangement.[10] Canada's unwavering insistence that the Regulations be enforced reflects the governmental policy decision that disclosure of documents and information covered by the Regulations would be inimical to the national interest of Canada.[11]

The Canadian government has, on a number of occasions, expressed the seriousness with which it regards efforts of U.S. litigants to obtain United States court orders that would induce behavior in Canada violative of the Regulations. For example, in a November 8, 1978 diplomatic note, Hon. D. Jamieson, Canada's Secretary of State for External Affairs, stated:

> A situation in which courts of the United States imposed sanctions for failure to produce documents or information located in Canada where such production would violate Canadian laws and regulations would be a matter of serious concern to the Government of Canada because it would subordinate to the procedures of U.S. courts the authority of the Government of Canada to prohibit the disclosure of certain information in Canada relating to the production and marketing of Canadian uranium. Such

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[10] Applications for such relief have been presented by various companies. The Minister refused all applications before November 10, 1977, on the grounds that exemptions or other relief would be contrary to Canada's national interest. Thereafter, the Minister refused all applications because he no longer had authority to grant exemptions or other relief. See note 6 *supra*. We note that one exemption from the Regulations was granted before November 10, 1977; it did not involve documents or litigation relating to the international marketing arrangement.

[11] Although certain pleadings contain statements which may imply that the Regulations have been violated (e.g. Westinghouse Mem. at 15), Canada's Attorney General does not have reason to believe that any violations have occurred.

> a failure on the part of the courts in the United States to recognize the authority of the Canadian Government to prohibit such disclosure would be contrary to generally accepted principles of international law and would have an adverse impact on relations between the USA and Canada. Att. D at 1.

Canada's concern extends to the present case, where the pending motions seek to compel certain parties to produce documents and information covered by the Regulations, i.e., documents located in Canada that relate to uranium exporting or marketing during 1972-75.

II. *Legal Discussion*

The starting point for consideration of the present motions is that the Uranium Information Security Regulations, expressing national policy on an issue of vital concern to Canada, prohibit the disclosure of a category of documents (or their contents) located in Canada that relate to uranium exporting or marketing. Canadian law provides for substantial criminal penalties in the event this prohibition is violated. Canada insists that the prohibitions contained in these Regulations be obeyed by all persons subject to them.

These Regulations, an act of state that has the effect of barring certain discovery in the present litigation, are entitled to the full respect of this Court.

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897).

As we have stated, these Regulations were put into place to protect Canada's sovereign prerogatives and its present and future ability to organize sectors of its economy as it sees fit. They were not promulgated for the benefit of private commercial interests. In any event, the factors in the Canadian political process that led to the promulgation of these Regulations may not be the subject of American judicial inquiry or challenge. These Regulations were deferred to in the case of *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977), where the Tenth Circuit observed:

> The records . . . are physically located in Canada. Such being the case, it would not seem unreasonable that the Canadian Government should have something to say about how those records will be made available to interested outsiders. That Canada has a legitimate "national interest" in this matter is perhaps best illustrated by reading the opinion of the Ontario Supreme Court, wherein it . . . . determined that the nondisclosure regulations were in furtherance of a national interest in controlling and supervising atomic energy. 563 F.2d at 998.

Cases, such as this, involving potential conflicts between the discovery procedures of United States federal courts [12] and the laws of foreign sovereigns are determined in accordance with principles of international comity, which are recognized by and reflected in United States law. *E.g., Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (international law principles as part of American law). These

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[12] That is, Rules 26-37 and 45, Fed.R.Civ.P, and Rule 17, Fed.R. Crim.P. We assume for present purposes that, but for the Canadian Regulations, the documents and information in question would fall within the scope of the civil discovery rules.

principles require, in appropriate cases, that U.S. courts refrain from enforcing the prescriptions of the Federal Rules of Civil Procedure. Such deference does not constitute, as certain parties would have this Court believe, an abdication of judicial responsibility to apply United States law. It represents, rather, a judicial decision that American law, because it incorporates principles of international comity, properly mandates a course of deference.

Canadian courts, like U.S. courts, recognize the propriety of deferring to foreign law in accordance with principles of comity. For example, in *Frischke* v. *Royal Bank of Canada*, 1977 17 O.R.2d 388 (Ontario C.A.), the Ontario Court of Appeal reversed a trial court's order directing a third party to contravene Panamanian law and provide certain information. In reversing, the court cited analogous United States cases and declared:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws. The principle is well recognized. 17 O.R.2d at 399.[13]

We respectfully submit that deference to foreign law is required in this case by two factual circumstances, namely (a) that the documents sought are located in Canada, and (b) that the law of Canada prohibits the production or identification of such documents, subject to criminal sanctions. In cases involving these factual elements, United States courts have consistently refused to

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[13] The Ontario court cited *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968) and *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962). It observed that Canadian courts would defer to foreign law except in ". . . cases of very special circumstances." 17 O.R.2d at 399.

compel the production of documents,[14] reflecting the view that these particular factors tip the balance decisively and finally against the compulsion of discovery. *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (law of Canada); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (law of Panama); *see Federal Maritime Commission* v. *DeSmedt*, 268 F. Supp. 972, 974, 975 (S.D.N.Y. 1967) (law of Great Britain and Canada); *see also Ings* v. *Ferguson*, 282 F.2d 149, 152, 153 (2d Cir. 1960) (law of Canada); *First National City Bank of N.Y.* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (law of Panama); *see generally United States* v. *First National City Bank*, 396 F.2d 897, 901-905 (2d Cir. 1968) (law of Germany).[15] Thus, in *Ings* v. *Ferguson*, the Second Circuit stated:

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[14] That is, they have either refused to enter an order directing production or, in the alternative, have refused to enter sanctions for a party's failure to comply with such an order. The distinction between a decision ordering discovery and a decision ordering sanctions is discussed *infra* at 15-19.

[15] In *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968), the Second Circuit, while upholding a contempt order imposed upon a grand jury witness who had refused to produce documents because of German *civil* law, implicitly reaffirmed the principle that such compulsion would have been improper had a foreign law with *criminal* sanctions been involved:

> Citibank concedes, as it must, that compliance with the subpoena does not require the violation of the criminal law of a foreign power . . . . or risk the imposition of sanctions that are the substantial equivalent of criminal penalties. . . .
>
> [T]he government urges vigorously . . . [that] a witness . . . must show that following compliance it will suffer criminal liability in the foreign country. We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. . . . The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law. 396 F.2d at 901, 902 (citations omitted).

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts. . . . If upon such proceedings, i.e. letters rogatory . . . production were declared illegal the motion to quash should be granted . . . because the exception of illegality under foreign law would have been met. 282 F.2d at 152, 153 (citations omitted).

Although other factual elements need not be consulted in deciding to defer to the Regulations here, we nonetheless observe that other factors in the present setting buttress the conclusion that deference is the proper course of action.[16]

(a) Canada is a friendly government. *Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

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[16] The scope of considerations that may be relevant, depending upon the factual matrix of the particular situation, is indicated by § 40 of the Restatement of Foreign Relations Law (Second), which sets forth criteria governing application of the principles of comity and fairness when there are conflicting rules. The Restatement cites such factors as: "(a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." This section of the Restatement has been cited with approval by U.S. courts. *E.g., In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir. 1977); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976).

(b) The Uranium Information Security Regulations are expressive of a vital Canadian national interest. *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (10th Cir. 1977). The importance that the Canadian Government attaches to enforcement of these Regulations has been underscored by its numerous protests to the exercise of enforcement jurisdiction, as reflected in the attachments to this memorandum. *See In Re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298, 318 (D.D.C. 1960) (foreign governmental protests caused court to delay production); *cf. Arthur Andersen and Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied sub nom. Arthur Andersen and Co.* v. *Ohio, et al.*, 429 U.S. 1096 (1977) (lack of foreign protest cited as contributing to subpoena enforcement); *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968) (no foreign or American protest).[17]

(c) In contrast to a government enforcement proceeding, the effort of TVA and Westinghouse to obtain discovery in these private antitrust actions does not involve vital national interests of the United States. *See In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977). This is particularly true where, as here, the Department of Justice has previously investigated the matter in dispute and completed a prosecution on behalf of the American government. It should be noted that the Department of Justice was able to bring its investigation to conclusion

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[17] Westinghouse asserts that the absence of a protest from the United States Executive Branch is a weighty factor to be considered with regard to comity. American judicial authorities, however, indicate only that the absence of an American protest may be significant where, unlike here, the foreign government has itself failed to protest. See cases cited pp. 13-14 *supra*, and *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 418-420 (1964).

without having access to documents covered by the Regulations.

(d) The Canadian and American governments have been engaged in consultations exploring cooperation in enforcement of the countries' respective antitrust laws and avoidance of potential conflicts between the application of the United States antitrust laws and Canadian sovereign interests. These consultations are in an advanced stage, and a judicial decision insensitive to Canadian sovereignty could adversely affect this process. *See Federal Maritime Commission* v. *De Smedt*, 268 F.Supp. 972, 974, 975 (S.D.N.Y. 1967) (conflict a matter for diplomatic negotiation); *cf. American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971) (no international relations problem).

These factors confirm and reinforce the conclusion that deference to the Regulations is required, and that the parties in this case may not be penalized for complying with them. The remaining question is essentially one of timing—that is, whether this Court should deny the Rule 37(a) motions because they seek orders requiring conduct in violation of Canadian law, or should direct production and put off the issue of comity until sanctions are sought for non-production. With all respect, the Canadian government suggests that the first approach is to be preferred in the present case.

The weight of United States authority indicates that the prohibitions contained in foreign criminal laws should be considered in deciding whether to order production, and that such an order should only be entered in the face of such a law when necessary to facilitate a clarification of the scope of foreign law or the enforcement intentions of the foreign sovereign. Thus, in *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), where clarification was not needed, the Second Circuit affirmed a trial court's refusal to compel produc-

tion. Conversely, in *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960), the same appellate Court affirmed a trial court's decision to enforce a subpoena while a clarification of Canadian law was being sought, observing that the subpoena should be quashed if that clarification revealed that Canadian law prohibited production.[18] Similarly, in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), which affirmed the entry of a production order, the Supreme Court stated:

> Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance . . . . United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability . . . .
>
> We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. 357 U.S. at 205, 206.

Here, the Canadian government has, on a substantial number of occasions, expressed its continuing intention to enforce the Security Regulations in accordance with their terms. It has denied applications for exemptions and other relief. There appears to be, accordingly, no justification for the entry of any production order.[19]

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[18] *Accord: First National Bank of N.Y.* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2nd Cir. 1959); *see also Sneaker Circus, Inc.* v. *Carter*, 566 F.2d 396, 400 n.10 (2nd Cir. 1977).

[19] This history flatly refutes Westinghouse's suggestion (see Westinghouse Mem. at 17, 25-27) that a court order might alter Canada's insistence that its Regulations be obeyed.

Westinghouse and TVA nonetheless seek entry of a production order, urging this Court to postpone any consideration of Canadian law and comity until a later stage in this proceeding. Movants' primary argument—namely, that this Court should simply disregard foreign law in deciding whether to order production—is at odds with United States case law, including the materials they cite. More particularly:

(a) They refer to decisions indicating that this Court has the *power* to enter a production order despite conflicting foreign law. The fact that this Court possesses such power does not, of course, suggest that it is inappropriate for the Court to consider foreign law in deciding whether to order production.[20] As we have shown, the weight of authority supports such consideration here.

(b) Movants not only propound a purported rule requiring postponement of comity issues in the absence of supporting decisions, but also seek to dismiss the line of Second Circuit decisions refusing to direct production on the fallacious ground that those cases have been disavowed by that Court. The fact is, however, there has been no such disavowal;[21] indeed, the Second Circuit re-

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[20] Movants rely heavily upon the decision in *Arthur Andersen and Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied sub nom. Arthur Andersen and Co.* v. *Ohio, et al.*, 429 U.S. 1096 (1977), in which the Tenth Circuit held that a trial court was not *required* to consider foreign law in entering a production order, and that the Court would therefore not mandamus the trial judge who had ordered production while ignoring comity considerations. It is one thing to say that a trial court is not required to consider comity, and quite another thing to say the court may not or should not consider such factors. The *Andersen* case does not stand for the latter proposition.

[21] The alleged disavowal cited by Westinghouse is supposedly contained in the Second Circuit's 1968 decision in *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968), discussed note 15 *supra*. Westinghouse's argument is untenable because the

cently reaffirmed these cases.[22]

(c) Westinghouse incorrectly refers to the language of § 40 of the Restatement of Foreign Relations Law (Second) as if it supported a two-step process whereby the court "prescribes" a rule of law by ordering production and considers comity only when it "enforces" a production order at the sanctions stage. In fact the Restatement, in addressing the situation where two states have jurisdiction to "prescribe and enforce" rules of law, recognizes the obligation of all courts to consider conflicting foreign law whenever the enforcement of existing legal prescriptions—such as those found in the Federal Rules—is at issue. Here, a production order would enforce the discovery Rules and, under § 40 of the Restatement, the principles of comity are to be considered by this Court in deciding whether such implementation is proper.

Movants' remaining argument for postponing a decision on deference to Canadian law is that a full factual record on the issues of defendants' "good faith" could be developed after entry of a production order. The Canadian government of course takes no position on the allegations of discovery-related misconduct which are said to support the imposition of sanctions on various of the defendants. But the presence of such issues, and the need

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Citibank case did not involve a definitive foreign prohibition carrying criminal sanctions; the court in fact recognized that a production order would not have been proper in the face of foreign criminal law.

[22] *See Sneaker Circus, Inc.* v. *Carter*, 566 F.2d 396, 400 n.10 (2d Cir. 1977), where the court referred with approval to "the line of cases which holds that production of documents should not normally be ordered if such an order would cause an individual to violate foreign law," citing prior Second Circuit decisions, while recognizing that the Tenth Circuit had permitted a different approach to such orders in *Arthur Andersen and Co.* v. *Finesilver, supra.*

to resolve them, do not require the Court to order production in violation of Canadian law—which would suggest insensitivity to Canadian sovereign interests and principles of comity. This Court has authority, without directing production, to conduct a hearing on the issues of alleged misconduct and to compile a full factual record. The Court could then determine whether the failure of any party to make discovery had been caused by factors independent to the Regulations and, in the event such factors were found to exist, to enter thereupon an appropriate order and sanctions. *See Independent Productions Corp.* v. *Lowes, Inc.*, 27 F.R.D. 426 (S.D.N.Y. 1961). Such a procedure would conform with U.S. procedures without trenching upon considerations of comity.

III. *Conclusion*

We respectfully urge this court, for the foregoing reasons, to uphold accepted principles of international comity by refusing to order behavior that would violate Canadian law.

Respectfully submitted,

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May 21, 1979

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS TO IMPOSE SANCTIONS FOR FAILURE TO PRODUCE DOCUMENTS WHOSE PRODUCTION IS PROHIBITED BY CANADIAN LAW

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May 8, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

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The Government of Canada respectfully submits this memorandum as *amicus curiae* to present its views on the propriety of imposing the sanctions sought by Westing-

house Electric Corporation ("Westinghouse") and Tennessee Valley Authority ("TVA") against certain defendants in the above entitled actions. The Government of Canada previously appeared as *amicus curiae* before this Court in connection with Westinghouse's and TVA's motions for an order to compel discovery.[1] In its Memorandum Decision of November 7, 1979,[2] the Court adopted a "two-step" approach to the discovery question proposed by Westinghouse. It directed production of foreign documents but deferred consideration of foreign law until an anticipated second step (on motions for sanctions) at which time it would place "the competing interests of the United States and the foreign governments on a plane where the potential moderation of the exercise of their conflicting enforcement jurisdictions can be meaningfully considered.[3] The Government of Canada now requests the Court to consider the compelling interests of international comity and foreign relations, and the interests of Canadian law and sovereignty.

We submit that principles of international comity must be taken into account in determining the pending motions. Under such principles, it would not be proper to take adverse action against any party because of the failure to produce documents or information when its failure is due to the fact that production is prohibited by the law of a friendly foreign country, such as Canada.

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[1] Memorandum of Government of Canada as *Amicus Curiae*, dated May 21, 1979 (hereinafter referred to as "Canada Memorandum").

[2] *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138 (N.D. Ill. 1979).

[3] *Id.* at 1156.

The absence of such documents or information may have an effect upon the assessment of the evidence before the Court in the light of the rules of burden of proof. In this case, the absence of evidence from Canada may be to the disadvantage of plaintiffs on some issues and to the disadvantage of defendants on other issues (*e.g.*, proof of defenses based on foreign law). But these are consequences that flow from the absence of evidence—not from assigning fault or prejudice to any party because of the non-production itself. It would be improper to resolve any issue adverse to a party in this case merely because that party declined to violate a criminal prohibition of the law of Canada and therefore was unable to produce documents subject to this case. Furthermore, before considering the sanctions motions, it is the view of the Canadian Government that the Court should examine the extent of its subject matter jurisdiction. Such a consideration should assist in its disposition of the sanctions issues. The Canadian Government intends to seek leave of Court to file an amicus brief on the pending motions of Denison, Gulf and GMCL which raise these jurisdictional questions.

Part I of this memorandum examines Canada's long-standing and comprehensive government regulation of its uranium industry and the importance of the government's steadfast adherence to the Canadian Uranium Information Security Regulations in the overall regulatory scheme.

Part II of this memorandum speaks to the legal authority supporting the position taken by the Government of Canada. United States precedents require the consideration of the interests of foreign law and sovereignty. They also support the proposition that, under United States law, a court may not impose any Rule 37(b) sanction for failing to comply with a discovery order if the reason for non-production is a criminal prohibition under

foreign law rather than willfulness, bad faith or any fault of the party. Imposition of these sanctions, absent the requisite finding of bad faith, would violate established principles of international comity and would very likely have a deleterious effect on the relations between the United States and Canada.

I. CANADA'S URANIUM RESOURCE INDUSTRY AND GOVERNMENT REGULATION

A. The Development of the Canadian Government Policy on the Uranium Industry

The Canadian uranium industry, since its birth in the late 1940's, has developed primarily to supply the export market. Canadian Government policy governing the export of Canadian uranium has evolved over the same period largely in response to changing market circumstances but guided by a set of overall objectives that seek to bring optimum benefit to Canada from the development of its mineral resources. These objectives developed in cooperation with Provincial Governments have been:

1. to ensure adequate supplies for domestic needs;
2. to increase the return to Canadians from exportable surpluses;
3. to strengthen the knowledge base for national decisionmaking;
4. to contribute to orderly world mineral development and marketing;
5. to realize opportunities for further processing;
6. to insure national self-determination in mineral development.

Policy statements which the Canadian Government has made with respect to uranium are attached as Appendix

A. In the early 1950's, special incentives were given to the uranium industry to encourage its vigorous expansion largely to meet United States demand for uranium for its nuclear weapons program. Prior to May 7, 1958, it was the Canadian "Government's policy that Eldorado Mining and Refining Limited [a Crown corporation] be the sole buyer and seller of all uranium produced in Canada".[4] As Eldorado was by legislation an agent of the Canadian Government for all of its purposes, the Government effectively controlled the volume and price at which uranium was exported from Canada. In 1958, the Canadian Government allowed "the private producer to make his own arrangements for the sale of any uranium which Eldorado is satisfied will be surplus to his contract requirements with Eldorado."[5] However, export permits were required from the Atomic Energy Control Board and the Department of Trade and Commerce. The agencies, prior to granting export permits, were required to examine such matters as quantities to be exported and further processing and cooperative agreements with the recipient country with respect to the Peaceful Users of Atomic Energy.

In 1959, the United States announced it would not be exercising options to purchase additional uranium from Canadian producers beyond that already contracted for and the Canadian uranium industry went into a severe decline. The situation for Canadian and other non-U.S. producers of uranium was further aggravated when in the 1960's the United States, to protect its own domestic uranium producers, effectively embargoed the use of foreign uranium by utilities in the United States. This closed 70 percent of the free world market to non-U.S. producers. In order to prevent a complete collapse of its industry, the Canadian Government instituted stockpiling

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[4] See press release dated May 7, 1958 in Appendix A.

[5] *Id.*

programs during the 1960's and early 1970's at a direct cost, excluding interest and other carrying charges, of $130 million (Canadian). One of these stockpiling programs, as announced by the Prime Minister in 1965, was "to avoid any reduction in the current level of employment and production in the industry in Canada".[6]

In 1969, the Canadian Government extended its regulatory control, requiring a specific review of contracts:

> "To protect the national interest in the different circumstances which now face us we will henceforth require that all contracts covering the export of uranium or thorium be examined and approved by the appropriate federal agency before any application for an export permit is considered. The examination will cover all aspects and implications of the contract such as nuclear safeguards, the relationship between contracting parties, reserves, rate of exploitation, domestic requirements, domestic processing facilities, and selling and pricing policy. Approval will not normally be given to contracts of more than ten years duration unless provision is made for renegotiation of price." [7]

When conditions in the uranium market began to deteriorate, the Canadian Government took a number of specific actions. In 1970, it instituted a joint-venture stockpiling agreement with one of its producers to maintain employment and production. Secondly, it attempted to elicit cooperation of consumer countries in maintaining orderly marketing. After this effort failed, the Government in 1972 took the initiative in formulating an international marketing agreement with other producing nations, as described below. The Government also, by regulation, required the A.E.C.B. to ensure, prior to granting

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[6] See Prime Minister's statement of June 3, 1965 in Appendix A.

[7] See Press release dated June 19, 1969 in Appendix A.

export permits, that contracts be in accord with a set of minimum price levels and volumes of sales to be established by Ministerial directive. Between 1972 and 1975, a series of general Ministerial directives were in effect. Since that time, Ministerial directives have been issued with regard to specific transactions after review by an interdepartmental panel.

In 1974, when the market turned upward, there was growing pressure on Canadian producers to meet export opportunities. Therefore, to protect its own domestic requirements, the Canadian Government placed specific time limitations on export approvals while at the same time it continued to require the regulating agencies to examine contracts with regard to price and volumes of sales. The Government noted that export approval would "not normally be given if the pricing conditions for foreign customers were more favourable than those offered to domestic purchasers".[8] Export contract approvals were limited to ten years from the date of signing of the contract and contingent approval was possible for an additional five years. In reiteration of the 1969 policy statement, such contingent approval was not to be given unless there was provision in the contract for renegotiation of price for uranium supplied during the additional five years.

The Canadian Government's control of commercial terms under which uranium is exported applies to all exports, including those for end use in the United States. Prior to 1975, essentially all deliveries of uranium for end use in the United States were sold to the United States Atomic Energy Commission under contracts negotiated during the 1950's; however, in the mid-1970's certain Canadian producers concluded contracts directly with U.S. customers. The terms and conditions of these contracts, including prices and volumes, were subject to

[8] See Press Release dated September 5, 1974 in Appendix A.

review and approval by the regulating agencies. The Canadian Government continues to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports are in the public interest.

B. The Legal Structure of Canadian Government Regulation of the Uranium Industry

Canada has had a comprehensive regulatory system for its uranium resource industry since the birth of the industry in the 1940's. It has exercised its sovereign prerogative to regulate virtually every aspect of this industry, ranging from exploration and mining to export sales, to ensure compliance with Government pricing policy.

Canadian legislation governing atomic energy was first enacted on August 31, 1946 as *The Atomic Energy Control Act, 1946*, S.C. 1946, c.37, which was subsequently amended and consolidated as the *Atomic Energy Control Act*, R.S.C. 1970, c.A-19 ("Act"). This legislation was in force throughout the period during which the uranium marketing arrangement was in effect.

The Act established the Atomic Energy Control Board for the purpose of the Act. The preamble of the Act stated that "it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy". Pursuant to section 9 of the Act, the Board was empowered as follows:

> "9. The Board may with the approval of the Governor-in-Council make regulations
>
> . . .
>
> (b) regulating the production, import, export, transportation, refining, possession, ownership, use or sale of pre-

scribed substances and any other things that in the opinion of the Board may be used for the production, use or application of atomic energy;"

On July 29, 1972, a regulation was passed pursuant to the Act under which the Board was not to issue any export permit unless the contract price and quantities were in accord with the Ministerial price directive specified in the public interest (see subsection 201(2) of the Regulations below).

As noted above, a number of general directives setting out, *inter alia*, price and quota criteria were issued by the Minister of Energy, Mines and Resources to the Board and were in effect during the period July 19, 1972 to March 27, 1975, inclusive. On March 27, 1975, the Minister of Energy, Mines and Resources, by letter to the Board, cancelled all existing directives. Subsequent directives have been adopted by the Minister on a transaction-by-transaction basis.

The authority of the Minister of Energy, Mines and Resources to direct the Board in the aforementioned manner was pursuant to section 7 of the Act, which reads as follows:

> "7. The Board shall comply with any general or special Direction given by the Minister with reference to the carrying out of its purposes".

Section 201 of the Atomic Energy Control Regulations approved by P.C. 1960-348 as amended by P.C. 1972-1719 provided:

> "201(1). No person shall import into Canada or export from Canada any prescribed equipment for the time being specified by order for the purposes of this section or any prescribed substance without first producing to the Collector of Customs and Excise at the proposed port of entry or exit an import

or export permit from the Board, and no Collector of Customs and Excise shall permit any such prescribed equipment or any prescribed substance

(a) to be released or delivery to an importer in Canada; or

(b) to be exported from Canada,

unless the appropriate permit from the Board is produced to him.

(2) A permit to export prescribed substances shall not be granted unless the Board is satisfied that the prices stipulated for, and the quantities of, the prescribed substance proposed to be exported meet such criteria, if any, respecting price levels and quantities as may be specified in the public interest in a direction given to the Board by the Minister.

Section 201 was repealed by the Atomic Energy Control Regulations approved by P.C. 1974-1195 and the following substituted therefor:

5(1) No person shall

(a) import or export any prescribed substance, except in accordance with a license issued pursuant to section 7.

7(4) Subject to subsection (5), the Board or a designated officer may issue a license for any purpose referred to in section 5 upon receipt of a written application from the person requiring such license.

(5) A license to export a prescribed substance shall not be issued unless the Board is satisfied that the price and quantity of the prescribed substance in respect of which the application referred to in subsection (4) is made meet the criteria, if any, respecting price levels and quantities that may be specified in the public interest in a direction given to the Board by the Minister.

The authority of the Minister of Energy, Mines and Resources to issue directives pursuant to subsection 7(5) of the Regulations (formerly 201(2)) and section 7 of the Act was attacked in *Re AGIP S.P.A. and Atomic Energy Control Board et al.*, 87 D.L.R. (3d) (1978) (Federal Court of Appeal). The facts in that case were that the Minister had directed the Board that an export license not be issued to a foreign purchaser of uranium oxide from a Canadian producer if the sales were to be at a price less than $42.00 (Canadian) per pound. In addition, the Board directed that the payment by the purchaser to the Canadian producer of $42.00 per pound be a condition precedent to the issuance of an export license. Judicial review was sought pursuant to section 28 of the *Federal Court Act*, R.S.C. 1970, c.10 (2nd Supp.), which gives the Federal Court of Appeal jurisdiction to review decisions of a federal board, commission or tribunal "other than a decision of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

The Court quashed the section 28 application on the grounds that the decision of the Minister and the Board were administrative and, therefore, the Court had no jurisdiction. Le Dain, J. stated at page 535:

> "The decisions of the Atomic Energy Control Board in the exercise of its licensing function are made subject to direct ministerial control by means of directions expressive of governmental policy. This shows the very special position of the Board in this field: it is not exercising a truly independent adjudicative function on issues that viewed as a whole lend themselves to a judicial or quasi-judicial process. The reservation of the ministerial power to make directions upon the basis of the recommendations of a review panel composed of representatives of the departments concerned, as well as the Board,

> indicates that the issues in the final analysis are seen to be complex ones of national policy, involving in some cases questions of security, over which the Government acting in its executive capacity must retain ultimate control".

In addition to this far-reaching system of Government control under the Act over the export of uranium, the *Export and Imports Permits Act*, R.S.C. 1970, c.E-17 has also been in force. Under section 7 of that Act, the Minister of Industry, Trade and Commerce has the following power:

> "7. The Minister may issue to any resident of Canada applying therefore a permit to export goods included in an Export Control List or to a Country included in Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations"

Uranium, in either raw or treated form, including compounds, was placed on the Export Control List. There was, therefore, at all times relevant to the uranium marketing arrangement, legislation in force in Canada providing a second source of government control over uranium exports.

C. Canadian Government's Reaction to Restrictive United States' Policies and Regulations—The Establishment of and Participation in the International Marketing Arrangement

The long history of close Canadian Government involvement in and regulation of the uranium resource industry clearly establishes the degree to which the Government regarded the industry as vital to Canadian interests and the importance it consequently attached to industry compliance with Government policy respecting uranium marketing. For these reasons, the Canadian

Government, acting in cooperation with governments of other producing countries, initiated and later participated in an international uranium marketing arrangement. The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the national interest. Statements made by Canadian government officials reflect this involvement and these interests.[9]

The purpose of the international marketing arrangements was to allocate the meager non-U.S. demand among the non-U.S. producers, and to stabilize prices for a transitional period.[10] The arrangement did not apply to sales to consumers in participating countries and in the United States.

Until the marketing arrangements were discontinued in in 1975, the Canadian Government through govern-

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[9] See Attachments A-D to Canada Memorandum dated May 21, 1979. Attachment A is an October 14, 1977 press release issued by Hon. A. W. Gillespie, the Canadian Minister of Energy, Mines and Resources at that time, attaching (*inter alia*) the text of the Regulations and various pertinent diplomatic communications; Attachment B is a March 15, 1978 Diplomatic Note (No. 116) from Canadian Embassy to U.S. Department of State; Attachment C is Canada's *amicus curiae* brief filed on April 17, 1978, in the United States Supreme Court in connection with *General Atomic Co.* v. *Felter*, 436 U.S. 904 (1978); Attachment D is a November 8, 1978 Diplomatic Note (No. ECP-25) from Hon. Donald Jamieson, Canadian Secretary of State for External Affairs, to Mr. Thomas Enders, the United States Ambassador to Canada.

[10] The Canadian Government, which had previously objected through diplomatic channels to the United States' foreclosure of its uranium market, promptly advised the American government of the initiation of the marketing arrangement. See Canada Memorandum dated May 21, 1979 at Att. A, Note No. 210, August 4, 1969; Aide-Memoire of July 24, 1970; Note 359, December 3, 1971; February 14, 1972 letter from H. C. Armstrong to A. S. Freidman.

ment-owned corporations was an active participant in meetings and decisions of the marketing group. Officials of the Ministry of Energy, Mines and Resources, acting through these corporations, took an active role in all phases of the arrangement and attended meetings of producers from the various countries and of Canadian producers. In addition, Canadian Government officials made every effort to secure and did secure the participation of all Canadian uranium producers.

During the 1972-75 period, the participation of all Canadian uranium producers in the International marketing arrangement was a matter of firm Government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and regulations promulgated thereunder. This policy, which was clearly expressed in the public statements of Canadian officials, was defensive in nature and was considered to be in the vital national interest of Canada.

Contrary to Westinghouse's assertions that the Canadian Government merely "espoused the interests of the cartel participants as their own",[11] it is clear that the Government's establishment of and participation in the marketing arrangement was based on its view that the arrangement was essential to Canada's national interests. This is shown, for example, by the statement of Alastair Gillespie, Minister of Energy, Mines and Resources, in 1977:

> The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore,

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[11] Westinghouse Memorandum in Support of Motion for Sanctions Against Defendants Which Have Not Complied with the Court's Order for Production of "Foreign Documents", dated March 3, 1980 (hereinafter referred to as "Westinghouse Mem.") at 42.

> authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production. This policy was defensible in 1972 and it is no less defensible today. Canada Memorandum dated May 21, 1979 at Att. A, Statement dated October 14, 1977.

D. *The Canadian Uranium Information Security Regulations*

Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of long standing Canadian Government policy. This was especially so given the degree to which the government regulated the Canadian uranium resource industry and its importance to the national well-being. Accordingly, when it became clear that documents located in Canada bearing on the international uranium marketing arrangements and the Government's participation therein might be removed to the United States in response to legal proceedings there, the Canadian Government promulgated the Uranium Information Security Regulations, on September 23, 1976.

The Regulations were enacted to serve a vital national interest—the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural

resource. The Government's authority would be undermined if the multinational corporations that play a major role in the Canadian industrial and resource sectors were to be more responsive in their Canadian activities to U.S. laws than to Canadian law and policy. The Regulations cannot be considered apart from the history of direct government participation in the marketing arrangement and the Canadian Government's role as industry regulator over the past 30 years. As we have previously stated, the Regulations were not procured by members of the uranium industry and were not adopted to protect the commercial interests of those companies.[12] They were enacted to carry out matters of government interest and policy.

In the recent Canadian Supreme Court opinion on letters rogatory in these cases, Chief Justice Laskin recognized that the Canadian governmental interests here "transcended" the Regulations. *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, Supreme Court of Canada (Slip Op. March 18, 1980) at 17. (See Appendix B) In deciding whether the considerations of comity were sufficient to overcome the prohibitions against disclosure in the Regulations, the Chief Justice pointed out:

> the Uranium Information Security Regulations . . . were merely an expression of the Government's public policy and it is the policy rather than the regulations that, in this case, is a factor in the Court's exercise of its discretion. *Id.*

The Supreme Court recognized that Canada's interest in promulgating the Regulations stemmed not only from the fact that it viewed the extraterritorial application of United States antitrust law as a threat to its sovereign interests, but also that the Canadian Government itself was the implementer of, and a party to the arrangement:

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[12] See Canada Memorandum dated May 21, 1979 at 5.

> [W]here the Government is party to the arrangements out of which the documents, whose disclosure is sought, emerge, and it has promoted the arrangements as a facet of its energy policy in which the marketing of uranium is a central feature, I fail to see how public policy can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest. Again, the voluminous documents . . . are not simply private documents drawn up as a result of discussions and negotiations in which the Government of Canada played no part but, concededly, reflect an input by representatives of the Government. *Id.* at 22-23.

E. *Canadian Policy on Enforcement of the Regulations*

It has been the continuing and oft-stated policy of the Canadian Government to enforce the Uranium Information Security Regulations. In the period from the promulgation of the Regulations to date, numerous requests for waivers and approaches to ministers and officials of the Government of Canada have been made, seeking various forms of relief from the Regulations so that documents and information could be produced in U.S. court proceedings.[13] These efforts and the Government's responses were summed up in a Diplomatic Note from Donald Jamieson, Secretary of State for External Affairs of Canada, to Thomas Enders, U.S. Ambassador to Canada (No. ECP-25, November 8, 1978), in which it was stated:

> A number of parties to various civil actions before United States courts have made urgent and vigorous

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[13] Requests from Denison Mines Ltd., Noranda Mines Ltd., Gulf Minerals Canada Ltd., Gulf Oil Corp. and Rio Algom Corp. have all been denied. These requests were variously made by letter or at meetings attended by government officials.

requests to the Canadian Government for a waiver from the Regulations, amendment to the Regulations or any other action on the part of the Canadian Government which would enable them to comply with the orders of the U.S. courts. The Government has refused each of these requests and has continued to prevent production of the documents and information in question because it considers disclosure of documents to which the Uranium Information Security Regulations apply to be inimical to the national interest of Canada. The Canadian Government has also declined to release certain documents and information for the same reason when requested to do so by the Government of the United States for use in proceedings before a U.S. Grand Jury. Canada Memorandum dated May 21, 1979 at Att. D, Diplomatic Note ECP-25.

Since that time, further requests for relief have also been consistently denied. After this Court's Order of November 7, 1979, Acting Prime Minister Baker turned down a request by various defendants that the Government of Canada change its policy with regard to the Regulations and allow the production of the protected documents.[14]

In addition, efforts were made to obtain the documents covered by the Regulations by application to the courts of Canada. An application by Westinghouse to enforce letters rogatory and obtain such documents, issued by the United States District Court for the Eastern District of Virginia and the Court of Common Pleas for Allegheny County, were rejected by the Ontario High Court

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[14] Letters from Acting Prime Minister Baker to P.S.A. Lamek, John R. Light, Keith F. Bode and Jerry McAfee, dated December 21, 1979. Copies of these letters are included herein as Appendix C.

in 1977; an appeal was taken but eventually was dropped.[15]

Subsequent to this Court's Order of November 7, 1979, Gulf and Gulf Minerals Canada Ltd. ("GMCL") made application to the Supreme Court of Canada to enforce letters rogatory issued out of this Court and out of the United States District Court for the Southern District of California, seeking to obtain documents and information in the possession of GMCL and Gulf Canada Ltd. which were covered by the Regulations. The Attorney General of Canada intervened in the proceedings and opposed their enforcement, submitting, *inter alia*, that the Regulations reflected Canadian Government policy and it would be a wrongful exercise of discretion for the Supreme Court of Canada to ignore the policy by enforcing the letters rogatory. The Supreme Court of Canada recognized that "[w]ere it not for the *Regulations*, they [GMCL and Gulf Canada Ltd.] were quite prepared to make disclosure and thus to assist their parent company in the two actions." *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, Supreme Court of Canada (Slip Op. March 18, 1980) at 6, Appendix B. The Court dismissed the application, in light of public policy considerations articulated by the Attorney General of Canada. *Id.* at 23-24.[16] Thus, despite repeated attempts by various persons to obtain documents and information covered by the Regulations, the Government of Canada has steadfastly

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[15] *Re Westinghouse Electric Corp. and Duquesne Light Co., et al.*, 78 D.L.R. (3d (Ont. High Ct. 1977). The Attorney General of Canada appeared in opposition to this application.

[16] The two Canadian court decisions which have considered the validity of the Regulations have upheld them. *Re Clark et al. and Attorney General*, 81 D.L.R. (3d) (Ont. High Ct. 1977); *Re Westinghouse Electric Corp. and Duquesne Light Co., et al.*, 78 D.L.R. (3d) (Ont. High Ct. 1977). The Supreme Court of Canada did not reach this issue.

held to its insistence that disclosing these materials would be inimical to the national interest. Canadian courts have supported this position.[17]

II. LEGAL PRINCIPLES APPLICABLE TO THE IMPOSITION OF SANCTIONS

A. *Comity and International Law*

Principles of international comity preclude adverse action against any party because of such party's compliance with the prohibition of Canadian law and the consequent inability to produce documents and information in this litigation.

The principles of comity have long been recognized under United States law to be applicable in cases such as this involving conflicts between the discovery procedures of United States courts and the laws of foreign sovereigns. *See, e.g., In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998-99 (10th Cir. 1977); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (international law principles as part of American law). These principles under U.S. law require, in appropriate cases, that U.S. courts defer to foreign law because of considerations of international comity.

Canadian courts, like U.S. courts, recognize the propriety of deferring to foreign law in accordance with principles of comity. For example, in *Frischke* v. *Royal Bank of Canada*, 1977 17 O.R.2d 388 (Ontario C.A.), the Ontario Court of Appeals reversed a trial court's order directing a third party to contravene Panamanian

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[17] After the Supreme Court of Canada denied Gulf and GMCL's applications to enforce letters rogatory, counsel for various defendants again met with Canadian Government officials and requested that the Government change its policy with respect to the Regulations; again, the Government adhered to its prior position.

law and provide certain information. In reversing, the court cited analogous United States cases and declared:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We reject those laws. The principle is well recognized. 17 O.R.2d at 399.[18]

The United States Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) (hereinafter referred to as "*Societe*") held that a prohibition of foreign law provides a justification for not producing documents in response to requests for discovery. Such a prohibition gives rise to a party's "inability" to produce documents, and sanctions are not to be imposed if non-production "has been due to inability, and not to willfulness, bad faith or any fault" . . . of the non-producing party. *Id.* at 212. In *Societe*, as is the case here, "[i]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.* at 211.

3. *The Balancing Process*

The starting point in the task suggested by this Court of "framing the competing interests" [19] of the United States and Canada is to recognize that the Uranium Information Security Regulations were promulgated in furtherance of a national policy of vital concern to Can-

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[18] The Ontario court cited *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968) and *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962). It observed that Canadian courts would defer to foreign law except in "cases of very special circumstances." 17 O.R.2d at 299.

[19] *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979).

ada. These Regulations prohibit the disclosure of a category of documents or their contents which are located in Canada and relate to uranium exporting or marketing. Canadian law provides for substantial criminal penalties in the event this prohibition is violated.[20] Canada insists that the prohibitions contained in these Regulations be obeyed by all persons subject to them.[21]

These Regulations are entitled to the full respect of this Court.

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Underhill* v. *Hernandez*, 169 U.S. 250, 252 (1897).

See also Timberlane Lumber Co. v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976) (act of state doctrine requires a court not "to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivations of its actions.").[22] As

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[20] The maximum penalty for violation of the Regulations is imprisonment for up to five years and a fine not to exceed ten thousand dollars. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

[21] This is demonstrated by the repeated and firm refusal of the Canadian Government to grant relief from the Regulations, pp. 19-22 *supra*. Westinghouse's statement that it may be "justified in supposing that foreign authorities may not insist on inflicting punishment" were the Regulations violated (Westinghouse Mem. at 39) is clearly contrary to Canadian law and policy.

[22] International comity thus dictates that the Regulations be accepted as a sovereign act of Canada, and that inquiry into the factors in the Canadian political process that led to the promulga-

we have stated, these Regulations were put into place to protect Canada's sovereign prerogatives and its present and future ability to organize sectors of its economy as it sees fit.

These Regulations were deferred to in the case of *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (hereinafter referred to as "Westinghouse Uranium Contracts"), where the Tenth Circuit observed:

> The records . . . are physically located in Canada. Such being the case, it would not seem unreasonable that the Canadian Government should have something to say about how those records will be made available to interested outsiders. That Canada has a legitimate "national interest" in this matter is

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tion of these Regulations is inappropriate. In addition, apart from this rule of comity, it is clear that no claim could properly be advanced under U.S. antitrust law based upon private parties' requests for governmental action. The United States Department of Justice recently considered the question whether concerted action by foreign corporations to cause a foreign government to impose restraints which might affect United States commerce can be actionable under the antitrust laws. In the Department's "Antitrust Guide for International Operations" dated January 26, 1977, CCH Trade Reg. (February 1, 1977) at 61-62, the Department states that it considered the *Noerr-Pennington* doctrine to apply to foreign political processes:

> The only question here, therefore, is whether the *Noerr-Pennington* doctrine applies to efforts to cause a foreign government to impose restraints on U.S. commerce. While the *Noerr* case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area. . . . Accordingly, we conclude that A's activity, joining B, C, and D in the making of a recommendation that the government of X [to] exclude another U.S. competitor, does not violate U.S. antitrust law. . . . Under *Noerr-Pennington*, the collective exercise of the right of political expression is protected, even where its goal is highly anticompetitive. *Id.* at 62.

> perhaps best illustrated by reading the opinion of the Ontario Supreme Court, wherein it . . . determined that the nondisclosure regulations were in furtherance of a national interest in controlling and supervising atomic energy. 563 F.2d at 998.

In *Westinghouse Uranium Contracts*, the Tenth Circuit reversed the district court's contempt and sanctions order against Rio Algom Corporation for failing to produce documents subject to the Regulations on the ground that the lower court failed to engage in a "balancing" of governmental interests before imposing sanctions. The Court of Appeals framed the issue to be "the accommodation of the principles of the law of the forum with the concepts of due process and international comity," *id.* at 997 (citing *Arthur Anderson & Co.* v. *Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977)). Guidance as to the factors to be considered in the "balancing" process, the Court said, is found in Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States, which provides as follows:

> § 40. Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Thus, balancing these factors is not only a task which the court is obliged to undertake in determining whether to exercise jurisdiction over these actions (*see, e.g., Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976)), but it also is an essential aspect of its consideration of the motions for sanctions (*Westinghouse Uranium Contracts, supra*). Consideration of the factors to be weighed in such a balancing process suggests that denial of the motions for sanctions is required:

(1) *Vital national interests of each of the states*

In ordering defendants to produce foreign documents, this Court specifically reserved its full consideration of prior communications from foreign governments to the U.S. State Department until the sanctions stage. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979). The Government of Canada respectfully submits that this Court should consider the "vital national interests" of Canada, as expressed in these diplomatic communications in deciding the questions before it. *Westinghouse Uranium Contracts*, 563 F.2d at 998-99.

The Canadian Government, on a number of occasions, has expressed the seriousness with which it views the imposition of sanctions on persons because of their adherence to the foreign law of Canada. An order of the United States judiciary which would require behavior in Canada violative of the Regulations would be viewed

as disruptive of the friendly foreign relations between the two governments. For example, in an August 15, 1977 Diplomatic Note regarding another uranium related litigation, the Acting Canadian Secretary of State for External Affairs expressed Canada's concern over the issuance of an order imposing penalties for a corporation's failure to turn over documents in violation of the Regulations:

> The Canadian Government is deeply concerned that an Order has been issued by a U.S.A. court, the effect of which would be to compel the production of documents from Canada contrary to Canadian law, a result that would be inconsistent with international comity. Att. A, Diplomatic Note No. FLP-178 dated August 15, 1977.

In this same connection, a Diplomatic Note to the U.S. Department of State on March 15, 1978, stated that the Government of Canada would be "deeply concerned" if United States courts were to seek to induce behaviour in Canada in contravention of the Regulations. Canada Memorandum at Att. B, Diplomatic Note (No. 116) dated March 15, 1978.

At this sanctions stage of the discovery proceeding, the question of "the competing interests of the United States and foreign governments" becomes particularly important. *See In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979). The Government of Canada's interest in the sanctions question in these cases was set forth in a November 8, 1978 Diplomatic Note in which Hon. D. Jamieson, Canada's Secretary of State for External Affairs, stated:

> The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose

> information located in Canada where such production or disclosure would require a person or corporation in Canada to perform an act or omission in Canada which is prohibited by the Uranium Information Security Regulations or any other law of Canada. The threat or imposition of any such sanction would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian Government. Such procedure would be inconsistent with generally accepted principles of international law, with the manner in which the Governments of Canada and the United States carry on their mutual relations and with the spirit of those relations. Canada Memorandum at Att. D, Diplomatic Note No. ECP-25.

Canada's concern, as expressed above, extends "to the imposition of any sanction" where the only basis for doing so rests in a party's good faith adherence to Canadian law.

United States courts have recognized Canada's vital national interest in the Regulations. For example, the Tenth Circuit, in *Westinghouse Uranium Contracts*, recognized that Canada's national interest in obtaining adherence to the Regulations superseded the United States' interest in providing a private party in an antitrust action with discovery. *Westinghouse Uranium Contracts*, 563 F.2d at 998-99.[23]

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[23] This is particularly true where, as here, the Department of Justice has previously investigated the matter in dispute and completed a prosecution on behalf of the American government. It should be noted that the Department of Justice was able to bring its investigation to conclusion without having access to documents covered by the Regulations.

Furthermore, it should be noted that, in the prior motions before this Court to compel production of documents, Westinghouse argued that the absence of a protest from the United States Executive Branch is a factor to be considered with regard to comity. Significantly, on March 18, 1980, the Department of Justice presented to the Seventh Circuit a communication of the Department of State stressing the substantial interests of Canada and other foreign governments in this case, and the need to take into account the views of such governments and the considerations of comity. This communication reads in pertinent part:

> The fact is that the foreign governments concerned have substantial interest not only in this litigation, but also in certain broader issues which it raises. There has been a considerable high-level diplomatic correspondence over the matter for several years. These concerns stem from a fundamental difference of opinion between these government [sic] and the United States Government over the propriety of the exercise of United States jurisdiction, including but not limited to United States antitrust jurisdiction, over persons of foreign nationality for actions taken outside the territorial jurisdiction of the United States. In this case the foreign governments have further concerns arising out of their involvement in developing and/or implementing official policies concerning uranium marketing which they deemed consistent with their national interest and which are now being challenged, not through diplomatic channels, but through private damage litigation in a U.S. court.
>
> * * * *
>
> It is our belief that in future proceedings in this and other cases, the courts should give due consideration to the views of interested foreign governments and take into account appropriate considerations of

comity where there is possible conflict between the laws or policies of nation states. (Letter from Robert B. Owen, Legal Adviser, Department of State, to John H. Shenefield, Associate Attorney General, Department of Justice, dated March 17, 1980, attached hereto as Appendix D.)

(2) *The extent and the nature of the hardship that inconsistent enforcement action would impose upon the person*

"It is hardly debatable that fear of criminal sanctions constitutes a weighty excuse for non-production". *Societe*, 357 U.S. at 211. Persons convicted of violating the Canadian Regulations face imprisonment for up to five years and a maximum fine of ten thousand dollars.[24]

(3) *The extent to which the required conduct is to take place in the territory of the other state*

As was the case in *Westinghouse Uranium Contracts*, the documents in issue are physically located in Canada and "[s]uch being the case, it would not seem unreasonable that the Canadian Government should have something to say about how these records will be made available to interested outsiders." *Westinghouse Uranium Contracts*, 563 F.2d at 998.

(4) *The nationality of the person*

The corporations that have possession and control of the documents in question are Canadian corporations whose officers and directors are subject to Canadian law.

(5) *The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state*

Compliance with the Court's discovery orders cannot be expected since it has been the firm policy of the Can-

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[24] Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

adian Government to require strict adherence to its laws and regulations in the nuclear industry.

In conclusion, these factors as they are applied to the situation before the Court, show that deference to Canadian law is the proper course. *See, e.g., Westinghouse Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (law of Canada); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (law of Panama); *Federal Maritime Commission* v. *DeSmedt*, 268 F. Supp. 972, 974, 975 (S.D.N.Y. 1967) (law of Great Britain and Canada); *Ings* v. *Ferguson*, 282 F.2d 149, 152, 153 (2d Cir. 1960) (law of Canada); *First National City Bank of N.Y.* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (law of Panama); *United States* v. *First National City Bank*, 396 F.2d 897, 901-905 (2d Cir. 1968) (law of Germany).

C. *"Punitive" and "Remedial" Sanctions*

Westinghouse and TVA take the position that the sanction of default can somehow be distinguished from all other sanctions available under Rule 37(b). They suggest that sanctions for failure to make discovery can be divided into two categories—"punitive" and "remedial", and it is only with respect to the "punitive" sanction of default that a prior showing of bad faith or fault on the part of the non-producing party must be made. They argue that a showing of willful noncompliance, bad faith or fault is unnecessary for the other sanctions, and that such sanctions may be imposed for non-production which is due to a party's good faith compliance with a criminal prohibition of foreign law. We submit that this argument is untenable as a matter of international comity and as a matter of United States law.

First, as regards the principles of comity, the imposition of any sanction based on a party's good faith

compliance with Canadian law would be offensive regardless of the nature of the sanction. This applies, of course, to sanctions which are virtually equivalent to resolution of the case on the merits—by entering findings on critical issues, precluding the introduction of evidence and similar actions. The Government of Canada is particularly concerned with the way in which proposed sanctions would foreclose issues of foreign law and comity, ignore the sovereign interests of Canada, and contradict specific representations and policies of the Government of Canada.

For example, Westinghouse's Proposed Findings of Fact 18-19 purport to deal directly with the role of the Canadian Government in the international marketing arrangement. These findings are offensive in that they completely ignore and contradict official statements of the Government of Canada regarding the events in issue, including statements to this Court and to the Executive Branch. It would be improper to enter a finding, for example, that the Canadian Government "made clear at all relevant times prior to 1976 that it was the producers, and not the governments, which ran the cartel", contrary to fact and to the Canadian Government's official statements, which are to be given deference.[25] Similarly, precluding parties from pursuing the merits of defenses of act of state and sovereign compulsion would flout established principles of foreign relations law.[26]

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[25] As a matter of comity, it is not appropriate to question a foreign government's motives or to look behind a foreign government's policy decisions. *See, e.g., Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976). See pp. 25-26 *supra*.

[26] The moving parties go so far as to suggest that the sanctions they seek against defendants in this litigation are necessary to "help to deter foreign governments from further enactments of this sort" (Westinghouse Mem. at 69). It would be plainly incon-

Second, the Government of Canada submits that under United States law, no such distinction among so-called "punitive" and "remedial" sanctions is made. As we have stated, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) holds that, because of principles of international comity and of due process, there must be a showing of bad faith or fault before any sanctions may be imposed; and compliance with foreign law provides justification (*supra*, p. 24).[27] *Societe* and other cases also clearly show that this proposition applies to all sanctions under Rule 37(b).

Westinghouse appears to argue that, absent a showing of bad faith on the part of the party from whom discovery is sought, *Societe* precludes dismissal (which was involved in that case) or a default judgment, but authorizes all other sanctions under Rule 37(b)—such as striking defenses, preclusion of evidence and entry of findings of fact, etc., no matter how stringent they are and no matter what the practical effect of imposing the sanctions would be on a party's ability to litigate the case. (See Westinghouse Mem. at 16-17.) Review of the Supreme Court's decision in *Societe* does not disclose any basis for this suggestion. While the Court makes reference to the district court's "wide discretion" in connection with how to proceed on remand, *id.* at 213, the statement is not, in any way, related to sanctions, entry of findings or any other action regarding the merits of the case to be taken as a result of the non-

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sistent with principles of comity to consider using judicial sanctions in a private case as a means of influencing the legislative prerogatives and executive acts of foreign nations.

[27] The Government of Canada notes that the parties against whom the motions for sanctions are pending have made many efforts to obtain the documents and information covered by the Regulations, both before and after this Court's Order of November 7, 1979 compelling discovery. See discussion at pp. 19-22 *supra*.

production itself. The Supreme Court was there referring to how the district court would proceed to resolve the case:

> It [the district court] may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. *Id.* at 213.

This does not support the conclusion that any judicial action is to be taken adverse to a party failing to make production because of foreign law, if "bad faith" is excluded.[28]

Nor is a different view to be inferred from the Court's observation that, "[t]his is not to say that [the non-producing party] will profit through its inability to tender the records called for",[29] a passage cited by Westinghouse and TVA.[30] Immediately thereafter, the Court entered into a discussion of the burden of proof on the non-producing party in that case, and the extent to which it would be handicapped by the absence of evidence. *Id.* at 212-13. Similarly, the opinion thereafter referred to the possibility that the lower court may be justified "in drawing inferences unfavorable to petitioner as to particular events." *Id.* at 213. This

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[28] This point is highlighted by the Court's reference in the remand discussion to a possible further challenge to the non-producing party's good faith. The Court had earlier indicated that the record supported a finding that the non-production "had been due to inability [because of foreign law] and not to willfulness, bad faith or any fault of the [party]." *Id.* at 212. The opportunity to reopen the issue of "good faith" was plainly intended to underline the critical nature of the "bad faith" exception to the rule against sanctions for nondisclosure due to foreign law.

[29] *Id.* at 212.

[30] See Westinghouse Mem. at 16; Brief of Plaintiff Tennessee Valley Authority in Support of Rule 37(b) Motion for Sanctions for Failure to Provide Discovery at 23.

referred to inferences that were said possibly to follow from the state of the record, in the absence of the documents sought. There is no suggestion of any inferences to be drawn from the non-production itself. Indeed, the Court then stated that "these problems go to the adequacy of petitioner's proof and should not on the record preclude petitioner from being able to contest on the merits." *Id.*

In sum, in *Societe* the Supreme Court did not invite district courts to consider sanctions for failure to make discovery, when due to a criminal prohibition of foreign law. It recognized that there were consequences which might follow from the absence of documents because of the prohibition of foreign law. But these were due to the application of the burden of proof in the light of resulting gaps in the record. The decision in *Societe* stresses the constitutional right of a litigant to try the merits of his claim and fully supports an approach under which, in the absence of bad faith, the district courts should accept the absence of documents due to foreign law, as analogous to other missing evidence. The courts are not entitled to make any decision on the merits, or to resolve any issue adverse to any party, on the basis of its failure to respond to discovery when that failure is due to a criminal prohibition of foreign law.

Westinghouse cites *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970) for the proposition that bad faith or fault is only relevant with respect to the sanction of default (Westinghouse Mem. at 14-15). Contrary to Westinghouse's assertion, *Dorsey* holds that where a party's failure to make discovery is due to its inability to do so, not to bad faith, the imposition of sanctions (including those other than default) is improper. *Id.* at 860, 862. The particular sanctions imposed by the lower court in *Dorsey* were the striking of a portion of plaintiff's claim and an order precluding the plaintiff from introducing certain evidence at trial.

Dorsey did not involve an issue of foreign law, but the decision plainly rejects any distinction between default and other sanctions. Judge Wisdom recited plaintiff's "diligent and extensive efforts" to comply with the discovery request and held that absent a finding by the district court that the failure to supply the requested information "was willful, in bad faith, or that the plaintiff had not made a diligent effort to obtain such information", the striking of a portion of her claim was improper. *Id.* at 860. The court went on to say:

> The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of a production order when the failure "was due to inability fostered neither by its own conduct nor by circumstances within its control". [Citing *Societe*]

Dorsey, 423 F.2d at 860. Similarly, the lower court's preclusion order was vacated on the basis of a holding that the plaintiff's inability to produce the documents "was not caused by her own misconduct," *id.* at 862, and that the lower court had not made a requisite determination that "the plaintiff's failure to produce the requested documents was either willful or in bad faith." *Id.* at 861.[31]

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[31] *See also Cine Forty-Second St. Theatre Corp.* v. *Allied Artists Picture Corp.*, 602 F.2d 1062, (2d Cir. 1979), in which an order of preclusion tantamount to dismissal was held proper only after court found answers to interrogatories to be either willful or so grossly negligent as to justify order; *Wilson* v. *Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (cited in Westinghouse Mem. at 17), in which the Fourth Circuit recognized that the "bad faith" requirement of *Societe* applied not only to the sanction of default, but to other less severe sanctions as well:

Accordingly, principles of comity and of U.S. law under Rule 37 lead to the same conclusion—that sanctions may not be imposed for a party's failure to produce documents when this is due to the party's inability to do so, including as in this case because of criminal prohibition of foreign law.

Conclusion

It is the view of the Government of Canada that the issue of this Court's subject matter jurisdiction should be decided prior to its consideration of the sanctions question. As to sanctions, however, we respectfully urge this Court, for the foregoing reasons, to honor the accepted principles of international comity and to decline to impose sanctions upon any party for failing to produce documents when such failure is due to compliance with Canadian law.

Respectfully submitted,

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May 8, 1980

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[31] [Continued]

The power to impose sanctions under Rule 37(b) for failure, after court order in discovery proceedings to produce documents is discretionary with the Trial Court. It is not, however, a discretion without bounds or limits but one to be exercised discreetly and never "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the non-complying party]." 561 F.2d at 503.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum of Government of Canada as *Amicus Curiae* on Motions to Impose Sanctions for Failure to Produce Documents Whose Production is Prohibited by Canadian Law was sent by first-class mail, postage prepaid, to all counsel of record on May 8, 1980.

/s/ Barry R. Goldsmith

[Attachments Omitted]

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

The Government of Canada respectfully submits this memorandum as *amicus curiae* to present its views on the pending motions for summary judgment on jurisdictional grounds filed by Gulf Oil Corp. and Gulf Minerals Canada Limited and by Denison Mines Limited and Denison Mines (U.S.) Inc.

The exercise of antitrust jurisdiction in this case is a subject of great concern to the Government of Canada. In its view, it is objectionable that actions of the Canadian uranium industry, taken outside the United States

in accordance with Canadian law and in response to declared national policy, should give rise to civil or criminal liability in the United States. The Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined. We file this memorandum to present to the Court a statement of Canada's position, including the factors which bear upon the jurisdictional issues from the standpoint of principles of international comity recognized by United States law.

This memorandum, and those previously filed in this proceeding,[1] represent the duly considered official position of the Government of Canada. The statements describing Canadian laws and policies and the factual background of such laws and policies were specifically approved and authorized at the Ministerial level by the Canadian Government.

The interest of the Government of Canada has been presented to the Court in prior filings as an *amicus curiae* in connection with the motions of plaintiffs Westinghouse Electric Corp. and Tennessee Valley Authority to compel production of documents whose production was prohibited by Canadian law, and their motions to impose sanctions for failure to produce such documents. In that connection, we discussed the interests of Canadian law and sovereignty and the requirements of international comity. We pointed out that principles of comity must be taken

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[1] Memorandum of Government of Canada as *Amicus Curiae*, dated May 21, 1979 on the motions of Westinghouse and TVA to compel production (hereinafter referred to as "Canada Memorandum on Document Production"); Memorandum of Government of Canada as *Amicus Curiae*, dated May 8, 1980 on the motions for sanctions (hereinafter referred to as "Canada Memorandum on Sanctions"); Memorandum of the Government of Canada as *Amicus Curiae*, dated November 6, 1979, filed in the Court of Appeals on appeals from the entry of default judgment.

into account in determining whether to exercise jurisdiction over these actions,[2] the issue now before the Court.

In the prior filings, we also described in some detail, on the basis of official Government statements, the development of the Canadian Government's policy regarding its uranium industry; the legal structure formulated for its comprehensive and pervasive regulation of that industry; and the Canadian Government's initiative and participation in an international uranium marketing arrangement.[3] These facts are, of course, highly material to the Court's consideration of its jurisdiction.

We submit that a balancing of relevant factors supports the position that antitrust jurisdiction should not be exercised over activities undertaken by Canadian companies outside the United States and within the scope of Canadian Government laws and policies regarding Canadian export trade in uranium. In particular, we refer to laws and policies governing prices, quantities and other terms of export transactions, and participation in the international marketing arrangement from 1972 to 1975.

Part I of this Memorandum briefly recapitulates the factual background of Canada's regulatory laws and policies.

Part II discusses the impact of international comity, as recognized by U.S. law, on the exercise of jurisdiction in these cases. It considers various factors which bear upon the exercise of antitrust jurisdiction in foreign commerce. It shows that jurisdiction should not be exercised with respect to conduct undertaken by Canadian

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[2] Canada Memorandum on Sanctions at 28.

[3] Canada Memorandum on Sanctions at 4-22, and Appendices A-B; *see also* Canada Memorandum on Document Production at 2-8, and Appendices A-D.

companies outside the United States pursuant to Canadian laws and policies for development and control of its uranium resources. We also point out that comity requires that Canada's statements as to the character and scope of its regulatory laws and policies be accepted.

I. THE SCOPE OF CANADA'S POLICIES ON URANIUM EXPORT MARKETING

From the outset Canada has exercised comprehensive and pervasive regulatory authority over the uranium industry, including exports. The industry was vigorously promoted, largely in response to United States' needs, and became a substantial factor in Canada's overall resource development program. By 1959, uranium was Canada's fourth largest export by value and employed 13,600 people. The industry then entered a period of disruption and decline because of United States' actions in limiting, then closing, its domestic market to Canadian product.

The Canadian Government undertook various actions designed to stabilize and salvage this important sector of its economy. It initiated a stockpile program. It strengthened its detailed control over export contracts. Beginning in 1969 the Government used its regulatory authority to establish and carry out a system for review of all aspects of export contracts, including pricing policy and sales terms.[4] Since 1972, Ministerial directions under the Atomic Energy Control Act dealing with price, quantity and other terms have been issued to the Atomic Energy Control Board, which reviews and regulates all uranium export contracts.[5]

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[4] Canada Memorandum on Sanctions at 7-8, 10-14.

[5] Canada Memorandum on Sanctions at 7-8, 14-16; Canada Memorandum on Document Production at 3-4.

As another remedial step, the Government attempted to initiate an arrangement between uranium producing and consuming nations in 1971. When that failed, it thereafter took the initiative with other producing nations in formulating and implementing an international marketing arrangement to stabilize the industry during a transitional period. This arrangement was in effect for about three years, 1972 to 1975. It governed sales for ultimate use in countries other than the participating countries or the United States.[6]

The marketing arrangement was implemented in Canada in part through general Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities for export sales to end-users in countries other than the participating countries and the United States. Prices and terms for other export sales covered by the arrangement, such as sales to manufacturers for resale and use in countries other than the participating countries or the United States, were regulated by the Atomic Energy Control Board on a transaction-by-transaction basis.

The Canadian Government directed its Government-owned corporations to participate in the meetings of the international marketing arrangement which discussed and arrived at proposed prices and quantities and other terms for export sales.[7] The Government also secured

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[6] Canada Memorandum on Sanctions at 7-9. The general directions issued by the Minister of Energy, Mines and Resources are set forth in the Canada Memorandum on Document Production, Att. A, Directions dated August 17, 1972, May 22, 1972, August 31, 1973, October 30, 1973, and March 6, 1974. The countries participating in the marketing arrangement were Canada, Australia, South Africa and France.

[7] Canada Memorandum on Sanctions at 7-9, 16. The officials of the Canadian Crown corporations, Uranium Canada Limited and Eldorado Nuclear Limited, were acting as agents of the Govern-

the participation of all Canadian uranium producers. This was essentially done by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest.[8] Given the range of existing tools at its disposal to ensure compliance of Canadian companies with its policies, including denial of export permits, it was not necessary for the Canadian Government to seek new legislation specifically requiring companies to participate in the uranium marketing arrangement.

While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate

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ment. The Uranium Canada officials were also officials of the Ministry of Energy, Mines and Resources and reported directly to the Government through their Ministry.

[8] Plaintiffs' citation of statements of Government officials that companies were not forced to participate are taken out of context (see TVA Memorandum at 21; Westinghouse Memorandum at 39-41). A complete reading of the text of Prime Minister Trudeau's statement in the House of Commons on October 25, 1977, in the correct order, indicates that it does not support the position for which it was quoted by Westinghouse. These statements reflected the position that the Canadian Government policy was a rational program undertaken in the interests of the national economy and of the industry and that it was so recognized by others concerned (e.g., Statement of Prime Minister Trudeau, Westinghouse Memorandum, App. 3). These statements support the gravity of the Canadian interest.

Further, references by Westinghouse to a message from Mr. MacDonald, the Minister of Energy, Mines and Resources, to the Canadian Uranium Producers on April 14, 1972 pre-dated the decision of the Canadian Government to issue regulations and directions under the Atomic Energy Control Act. See Canada Memorandum on Document production, Att. A, Statement by Hon. A. W. Gillespie at 6.

contracts on a transaction-by-transaction basis after review by an interdepartmental panel.[9]

Canadian laws and policies which have been described in official statements clearly applied to transactions by Canadian uranium producing companies with parties such as the plaintiffs in these cases during the period in question. The prices and terms of all uranium export sales from Canada (including those to the U.S.A.) have been reviewed and regulated by the Canadian Government. For example, sales to TVA were subject to Government review and control; indeed, this Court has previously been provided with evidence of the Government's rejection of a proposed sale contract with TVA.[10] All export contracts were reviewed to assure conformity with Government policies, including obtaining the optimum return for Canada's uranium resources.[11]

II. INTERNATIONAL COMITY AND THE BALANCING OF INTERESTS IN EXERCISE OF ANTITRUST JURISDICTION

The principles of comity in international law recognized by the U.S. law must be taken into account whenever it is proposed that a domestic law be given extraterritorial effect, by applying it to conduct subject to the authority of other countries where conflicting policies may govern. Comity requires that due deference must be given to interests and policies of other countries.

The need for such deference and accommodation to foreign interests and policies has been a particularly acute problem in the antitrust field over the years. Ex-

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[9] Canada Memorandum on Sanctions at 8, 9, 12-13.

[10] Canada Memorandum on Document Production, Att. A, letter of Donald S. MacDonald, March 27, 1975.

[11] *Id.*; Canada Memorandum on Sanctions at 4-5, 8-9.

pansive assertion of U.S. antitrust jurisdiction has led to resistance and friction abroad.[12] It has been viewed as an interference with other countries' laws and policies being properly applied to conduct within their territories. The consequence has been a growing acknowledgment of the need to balance the U.S. interest in antitrust enforcement against the interests of other countries, before antitrust jurisdiction can properly be exercised. "When foreign nations are involved, . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." [13]

A. *The Governing Authorities*

The balancing approach was embodied in the Restatement of Foreign Relations Law (Second), previously cited to this Court.[14] Section 40 of the Restatement declares as follows:

> § 40. Limitations on the Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, the possible modera-

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[12] *See, e.g.*, Comment, "Defenses to Actions Against Foreign States Under the United States Antitrust Laws", 20 Harv. Int'l L.J. 583, 619-21 (1979); Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 372 (1977); Restatement of Foreign Relations Law (Second), § 40, Reporters' Notes.

[13] *See Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979).

[14] Canada Memorandum on Sanctions at 25-34; Canada Memorandum on Document Production at 13.

tion of the exercise of its own enforcement jurisdiction, in the light of such factors as

(a) vital national interests of the states, respectively;

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;

(c) the nationality of the person; and

(d) the extent to which the enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The leading judicial authorities articulating this policy are the *Timberlane Lumber* decision in the Ninth Circuit in 1976,[15] and the *Mannington Mills* decision in the Third Circuit in 1979.[16] As the Ninth Circuit explained, there is a need for what it called a "jurisdictional rule of reason" in antitrust cases in foreign commerce.[17] The mere existence or allegation of effects upon U.S. commerce is not sufficient to sustain jurisdiction. The factors relevant to international comity have to be considered and the relative interests of the countries have to be appraised before jurisdiction can properly be asserted. The two Courts of Appeals have also set forth lists of criteria which elaborate somewhat upon the Restatement's factors.[18]

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[15] *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

[16] *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

[17] 549 F.2d at 613.

[18] *Timberlane*, 549 F.2d at 614, stated that "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or

This principle of comity as an inherent aspect of antitrust jurisdiction in foreign commerce has achieved widespread acceptance among antitrust authorities.[19] The U.S. Justice Department has welcomed the development, seeing the rule of comity as a means by which the courts will undertake the same balancing of factors which the Department performs in exercising its prosecutorial dis-

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principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."

Mannington Mills, 595 F.2d at 1297-98, stated that "The factors we believe should be considered include: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue."

[19] *E.g.*, Comment, "Defenses to Actions Against Foreign States Under United States Antitrust Laws", 20 Harv. Int'l L.J. 583, 611-619 (1979); Note, "Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum. L. Rev. 1247 (1977); Note, "Extraterritorial Application of the United States Laws: A Conflict of Laws Approach", 28 Stan. L. Rev. 1005 (1976). *See Domenicus Americana Bohio* v. *Gulf & Western Industries*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *In re Grand Jury Subpoena*, 396 F.2d 897, 903 (2d Cir. 1968).

cretion in foreign commerce antitrust cases.[20] It is significant that, in the present case, the Departments of State and Justice have stressed that appropriate considerations of comity should be taken into account.[21]

Plaintiffs have cited to this Court the Seventh Circuit's statement in connection with the default judgment in this case, that "the *Mannington Mills* factors are not the law of this Circuit".[22] In fact, the Court of Appeals held only that this Court had not abused its discretion with respect to the defaulting parties because it was not practicable, in the absence of such parties, to weigh the factors relevant to comity.[23] This limited holding does not suggest that the Court of Appeals would not apply to the pending motions the widely-accepted "jurisdictional rule of reason" in antitrust cases in foreign commerce.

Plaintiffs argue at length about the extent to which Canadian Government policy amounted to "compulsion" of Canadian uranium producers.[24] The cited cases re-

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[20] *See, e.g.*, Address of Carl A. Cirz., Jr., Assistant Chief, Foreign Commerce Section, Antitrust Division, "Current Developments in Antitrust and Foreign Trade—The Timberlane Analysis Progressing", May 23, 1979 (to the Westchester-Fairfield Corporate Counsel Association). *See* U.S. Department of Justice, Antitrust Guidelines for International Operations at 51-52 (1977).

[21] Letter from Roberts B. Owen, Legal Adviser, Department of State, dated March 17, 1980, forwarded to the U.S. Court of Appeals for the Seventh Circuit by Associate Attorney General John H. Shenefield, attached to Canada Memorandum on Sanctions, App. B; Letter from Associate Attorney General Shenefield to this Court, dated May 6, 1980.

[22] *In re Uranium Antitrust Litigation*, 1980-1 Trade Cas. ¶ 63,183 (7th Cir. 1980) at 77,897. See TVA Memorandum at 9, Westinghouse Memorandum at 16.

[23] 1980-1 Trade Cas. at 77,897.

[24] TVA Memorandum at 20-24; Westinghouse Memorandum at 37-45.

flected an earlier extreme assertion of U.S. antitrust jurisdiction, which paid scant heed to legitimate interests of other nations. Such an approach is not consonant with international comity. It is no longer the law of the United States. The very purpose of the Restatement, *Timberlane, Mannington Mills* and other cases is to get away from such wooden and overreaching application of U.S. antitrust jurisdiction.

The current law recognizes that the policies and interests of other nations must be recognized and given weight without requiring or expecting that they be expressed in a formalistic or legalistic manner familiar to U.S. law. Other nations can and do implement their policies and impose their requirements by other means, such as by administrative direction to government-owned corporations and by combination of pronouncements and regulatory steps, especially in a pervasively regulated sector like the Canadian uranium industry. Furthermore, instead of a narrow view of limited "defenses" like compulsion, the current law requires a broad assessment and balancing of interests in order to satisfy the demands of international comity.

Elsewhere in their briefs, plaintiffs appear to defer to Canada's interest in formulating uranium policies as it sees fit, and in effect acknowledge the paramount significance to be accorded such policies. Their briefs on the jurisdiction motions purport to disclaim any challenge to Canadian policies or to activities of the Canadian companies within the scope of such policies. Thus, TVA declares that it "does not challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its actions as they relate to the marketing arrangement".[25] Its challenge is addressed to activities of the companies which were "not within the realm of activity required by the Canadian Govern-

[25] TVA Memorandum at 17.

ment".[26] Similarly, Westinghouse affirms that it "does not challenge here the legality, propriety, or validity of any sovereign act of the Canadian government"[27] including what it calls the "limited price stabilization arrangement" condoned and approved by the Government.[28] Rather, Westinghouse "seeks to prove the considerable extent to which the members of the cartel exceeded the scope of any actions that may have been condoned by that government".[29]

Notwithstanding these disclaimers, plaintiffs assert a right to relief which would directly conflict with Canadian laws and policies. The balancing process should not permit an exercise of jurisdiction to that end.

B. *The Factors Controlling the Exercise of Jurisdiction in This Case*

Participation in the uranium marketing arrangement constituted an essential element of Canadian policy. In these circumstances, Canada considers it contrary to her sovereign prerogatives for a U.S. court to question the propriety or legality of the activities of Canadian uranium producers that were undertaken outside the United States and in compliance with or in implementation of Canadian Government laws and policies. We believe that a balancing of interests, called for by principles of international comity recognized by U.S. law, requires that antitrust jurisdiction not be exercised over claims addressed to such activities.

The factual circumstances, which require the conclusion that this Court should not exercise such jurisdiction, include the following:

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[26] TVA Memorandum at 14. *See also id.* at 8.

[27] Westinghouse Memorandum at 36.

[28] *Id.* at 16-17, 47.

[29] *Id.* at 17.

1. *Comparative National Interests*

Canada regards its uranium resource industry as vital to its national interest. It has had a long history of close involvement in, and pervasive regulation of, this sector of its economy. The international uranium marketing arrangement was but one element of governmental policy concerning management of this resource. This policy element was employed by the Government during a limited time period (1972-1975) when certain U.S. government policies threatened the survival of the entire Canadian uranium resource industry, thereby imperilling Canada's vital interests. The purpose of the international marketing arrangement was to minimize the disruptive effects threatened by American policies by allocating the meager non-U.S. demand among the non-U.S. producers, and by stabilizing prices for a transitional period.

> The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction. . . .[80]

The United States Government has acknowledged "the intensity and authenticity" of the interests of Canada

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[80] Canada Memorandum on Document Production, Att. A, Statement by Hon. A. W. Gillespie at 1. *See also* Canada Memorandum on Sanctions, App. D, Decision of the Supreme Court of Canada at 22-23.

and the other uranium producing countries.[31] Canada's right to adopt policies designed to control the marketing of a vital natural resource, particularly when the very survival of the industry producing that resource was threatened, goes to the very essence of sovereignty. This principle was recognized in *International Association of Machinists and Aerospace Workers* v. *The Organization of Petroleum Exporting Countries*, 1979-2 Trade Cas. ¶ 62,868 (C.D. Cal. 1979), where the Court referred to international recognition of "the principle that a sovereign state has the sole power to control its natural resources" [p. 79,011]:

> The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. . . . [T]here can be little question that establishing the terms and conditions for removal of natural resources from its territory . . . is a governmental activity. Plaintiff, however, asserts that . . . the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. [*Id.* at 79,011-012]

If this is true for the OPEC oil cartel's pricing, much greater deference should be given to the needs and interests of Canada which undertook temporary defensive

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[31] Letter from Associate Attorney General Shenefield to this Court, dated May 6, 1980; letter from Roberts B. Owen, Legal Adviser, Department of State, dated March 17, 1980 (Canada Memorandum on Sanctions, App. B). Mr. Shenefield, who was head of the Antitrust Division during the government's investigation of the uranium industry, has also recognized that "it was quite clear that foreign governments were intimately involved in the on-going actions of the cartel". Hearings before the Senate Judiciary Committee on the Nomination of John Shenefield, 96th Cong., 2d Sess. at 28 (January 24, 1980).

measures to maintain its uranium industry. In the circumstances here presented, Canada's interest in managing a vital natural resource is entitled to paramount weight. The imbalance between interests is particularly notable where, as here, we are dealing with private antitrust actions, which are entitled to less weight than governmental antitrust action or concern. *See In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977).

2. *Degree of Conflict*

Since activities pursuant to the uranium marketing arrangement constituted an essential element of Canadian national policy concerning resource management, a decision by this Court to exercise jurisdiction over these activities would constitute a direct threat to Canadian law and policy. Inquiry into the propriety or legality of these activities would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs. Beyond this, if the Court were to proceed to grant relief that punished defendants for actions taken in pursuance of Canadian national policy, there would be a direct and unacceptable conflict with Canadian law and policy. Canada would regard it as a serious breach of international comity if there were either an assessment of damages based upon such activities or an injunction which impeded Canada's future sovereign right to control its own economy.

This conflict is exacerbated by the protectionist position adopted by the United States. Having closed its domestic market to foreign competition, it would be highly inappropriate, if not offensive, for the United States to assert that its antitrust jurisdiction guarantees U.S. companies a "right" to penetrate the remaining world market free of any constraints resulting from the laws and policies of other nations.

3. *Location of the Challenged Conduct and the Parties*

The international marketing arrangement involved the governments of Canada, Australia, South Africa and France and uranium producers in those countries. The meetings and discussions took place in such countries (or elsewhere outside the United States) and the sales under the arrangement also took place outside the United States.

4. *Relative Significance of Effects in U.S. and Other Countries*

The international marketing arrangement was intended to stabilize and allocate the non-U.S. supply of, and demand for, uranium. No significant impact on the U.S. market could have been anticipated in 1972, since the United States Government had imposed an embargo on foreign uranium and at that time there was no prospect of its removal. Any potential effect on the United States was further minimized or excluded by providing that the arrangement did not extend to sales to the United States. (This was an accommodation to U.S. interests, consonant with the approach of comity.) Furthermore, the minimum prices set during the three-year period, except on one occasion, were below the domestic U.S. price.[32]

As a result of its antitrust investigation, the Department of Justice concluded that the marketing arrangement had "minimum direct effect" upon users in the United States.[33] Similarly, Senator Metzenbaum at a

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[32] Canada Memorandum on Document Production, Att. A.

[33] *See* Hearings before the Senate Judiciary Committee on the Nomination of John Shenefield, 96 Cong., 2d Sess. at 29 (January 24, 1980). Mr. Shenefield stated that a prosecution based on substantial or foreseeable effect upon the U.S. market would very likely have failed altogether because of the U.S. embargo and other factors (*id.* at 28-29). It was further explained that the prose-

hearing of the Antitrust Subcommittee of the U.S. Senate Judiciary Committee on January 24, 1980 stated:

> The evidence is clear that the cartel was not intended to, and did not have, its primary effect on U.S. commerce. The basic price fixing and production allocation provisions were designed primarily to stabilize foreign markets. The anti-competitive action by our own Government creates a strong argument in terms of the international laws of comity against criminal prosecutions of the foreign nationals involved here.[34]

The fact that effect upon the U.S. market was not likely and, if it occurred at all was much less important than the effect in foreign markets, strongly weighs against U.S. antitrust jurisdiction in these cases.

5. *Hardship of Inconsistent Enforcement Action*

Canada has a continuing policy of regulating its uranium industry and the terms of export trade in uranium. This case involves one aspect of that policy which was a temporary defensive measure, the international marketing arrangement in 1972-75. The exercise of jurisdiction here could potentially impose vast liability upon Canadian producers for their past conduct in compliance with and in implementation of Canadian Government law and policy. This would impose severe hardship upon the Canadian producers and would diminish the ability of the Canadian Government to regulate its resource industries.

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cution against a U.S. producer, charging a conspiracy against "middlemen" U.S. firms, was brought as a misdemeanor because it was clear that such alleged conspiracy ended early in 1974 (*id.* at 31), indicating only small effect.

[34] *Id.* at 9.

6. *Potential Impact on Canadian-American Relations*

The depth of Canada's concern relating to American efforts to inquire into Canadian policy has flowed from basic notions of sovereignty and fundamental considerations of national interest. This concern has been expressed in a substantial number of diplomatic notes and other formal expressions which have evinced the deleterious consequences of the exercise of antitrust jurisdiction over this subject matter.[35] The United States Departments of Justice and State have recognized the seriousness of the conflict and the legitimacy of the foreign interests.[36]

The conflict over extraterritorial reach of U.S. antitrust jurisdiction has been aggravated in this situation by a number of factors that have been noted: (a) The international uranium marketing arrangement was established in response to U.S. protectionist policies that threatened the survival of the Canadian uranium industry; and Canada advised the United States Government that the arrangement had been initiated. (b) Canada's use of the international marketing arrangement was intended to be and was only temporary, and during its short life the arrangement did not apply to sales to end-users in the United States. Thus, the arrangement was designed to secure the interests of the producing countries in maintaining their industries and was, at the same time, designed to avoid adverse impact on the United States market.

It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian-American relations. This situation is considered

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[35] Canada Memorandum on Sanctions, App. D; Canada Memorandum on Document Production, Att. B, D, E.

[36] See letters cited *supra*, n.31, p. 17.

undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction.

To sum up, the relevant factors demonstrate that antitrust jurisdiction should not be exercised over the alleged activities of Canadian uranium producers which were undertaken in compliance with and in implementation of Canadian laws and policies governing uranium export transactions, including the participation in the international marketing arrangement between 1972 and 1975.

C. *The Deference to be Given Canada's Statement of Its Law and Policies*

The balancing process, above discussed, is to be undertaken in the framework of Canada's statement of its laws, policies, and actions. This is another aspect of the application of international comity in these cases.

Under established principles of international comity recognized by U.S. law, the official pronouncements of a foreign government describing its own activities must be given conclusive effect by United States courts. In the present situation, where the Canadian Government has described to this Court laws, policies, and actions concerning marketing of Canadian uranium, this Court should accept Canada's statement as the basis for its consideration.

This principle stems from the underpinnings of the act of state doctrine; judicial inquiry or intrusion into the official acts taken by a foreign government within its borders is inconsistent with a proper regard for intergovernmental political relations. The act of state doctrine requires a court not "to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivations of its actions". *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d

597, 607 (9th Cir. 1976). In that light, it would be highly offensive for a court to pass on the truthfulness of an official declaration made by a friendly foreign government. *See, e.g., Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438, 443 (2d Cir. 1940); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

The courts of the United States have consistently adhered to this principle, and have accepted official governmental declarations as factually dispositive. *United States* v. *Pink*, 315 U.S. 203, 218-21 (1941) (official opinion of Soviet government concerning effect of Soviet decree is conclusive); *Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438, 443-44 (2d Cir. 1940) (affidavit from Spanish Ambassador accepted as proof of facts contained therein); *Malka* v. *E. F. Hutton & Co., Inc.*, 465 F. Supp. 131, 138 (S.D.N.Y. 1979) (the veracity of the French Government's denial of receipt of a loan cannot be examined in an American court); *D'Angelo* v. *Petroleos Mexicanos*, 422 F. Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (official statement by Mexican Government representative concerning the scope and effect of Mexican decree must be accepted by American court); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 332 (E.D.N.Y. 1977) (certified copy of minutes of Brazilian agency is dispositive of its reasons for denying export license); *United States* v. *Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960) (letter from Soviet Ambassador conclusively established defendant's relationship with Soviet government).

Thus, the courts have refrained from questioning or second-guessing statements of foreign governments as to factual matters pertinent to the issues before them. Evaluation of plaintiffs' allegations in this case must be made in the context of the Canadian Government's statements of its policies, legal framework, and decisions.

CONCLUSION

Accordingly, we submit that the Court should determine that antitrust jurisdiction will not be exercised over, and does not extend to, actions of Canadian uranium producers within the scope of Canadian Government laws and policies, including their participation in the international marketing arrangement for uranium between 1972 and 1975.

Respectfully submitted,

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Government of Canada

July 1, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds was sent by first-class mail, postage prepaid, to all counsel of record on July 1st, 1980.

/s/ Lionel Kestenbaum

APPENDIX J

[SEAL]

EMBASSY OF AUSTRALIA
Washington, D.C.

25 May 1979

The Hon. Judge Prentice H. Marshall,
United States District Court,
Northern District of Illinois,
219 South Dearborn Street,
Chicago, Ill. 60604

Dear Judge,

Re: In re Uranium Antitrust Litigation
MDL342

In re Tennessee Valley Authority
Uranium Antitrust Litigation
Master File No. 342A

1. On instructions from my Government I am writing to you further to my letter dated 30 April 1979 in connection with the abovementioned proceedings.

2. From the documents I have received from the Tennessee Valley Authority and from the Westinghouse Electric Corporation it appears that several parties to the proceedings have objected to requests for the identification or production of documents on the ground that the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 prevents their production or identification. I accordingly attach for the Court's information copies of the following documents:—

. Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 (No. 121 of 1976);

. Second Reading speech of the Attorney-General on the introduction of that Act into the Parliament;

. Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976 (No. 202 of 1976);

. Australian Government Gazette No. S239 dated 24 December 1976 containing copies of two orders by Attorney-General Ellicott under the said Act.

3. The orders set out in Australian Government Gazette No. S239 are still in force.

4. Several applications have been made to the Attorney-General for consent under section 5 of the said Act, but in each case consent has been refused. I attach for the Court's information a copy of each of the following letters sent by the Attorney-General to solicitors representing parties who had sought such consent:—

. Letter from Attorney-General Ellicott dated 23 December 1976 to Messrs Freehill, Hollingdale and Page, who had sought consent on behalf of Westinghouse Electric Corporation;

. Letter from Attorney-General Durack dated 21 April 1978 to Messrs Allen, Allen and Hemsley, who had sought consent on behalf of Mr. Paul Riddell (also attached, in this regard, are copies of Diplomatic Notes exchanged between the Australian Government and the United States Department of State);

. Letter from Attorney-General Durack dated 10 July 1978 to Messrs Overton Lyman and Prince who had sought consent on behalf of Getty Oil Company,

Getty Oil Development Company Ltd., and Getty Mining Pty. Ltd.;

. Letter from Attorney-General Durack dated 19 September 1978 to Messrs Overton, Lyman and Prince who had sought consent on behalf of Getty Oil Company, Getty Oil Development Company Ltd., and Getty Mining Pty. Ltd.

5. The Court's attention is particularly invited to the attached Second Reading speech of the then Attorney-General, in which he stated, with particular reference to the abovementioned and other uranium litigation that 'claims are being made that the United States anti-trust laws have an operation outside the United States to an extent which is beyond what is generally conceded in international law and beyond what other countries are presently prepared to concede in relation to the pending proceedings'. Moreover, as is explained in the attached letters for not granting consent, the orders issued pursuant to the statute were made because the then Attorney-General was satisfied that the restrictions provided in them were desirable for the purpose of protecting the Australian national interest.

6. The Court's attention is also particularly invited to the last two paragraphs of Attorney-General Durack's letter of 10 July 1978 to Messrs Overton, Lyman and Prince. Those paragraphs relate to the dilemma in which

persons would be placed if your Court were to order the parties before it to violate Australian law.

Yours sincerely,

/s/ Alan Renouf
(ALAN RENOUF)
Ambassador

[Attachments omitted]

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF AUSTRALIA ON SUBJECT MATTER JURISDICTION AND ON THE IMPOSITION OF SANCTIONS AGAINST DEFENDANTS FOR FAILURE TO PRODUCE DOCUMENTS WHOSE PRODUCTION IS PROHIBITED BY FOREIGN LAW

The Government of Australia submits this brief as *amicus curiae* to present its views to the Court on two issues now pending before this Court.

The first issue is whether the Court should grant the motions for summary judgments filed by Gulf Oil Corporation, Gulf Minerals Canada, Limited (GMCL), Denison Mines, Limited, and Denison Mines (U.S.), Inc. Those motions contend that this Court lacks subject matter jurisdiction or, alternatively, that this Court should refrain from exercising subject matter jurisdiction in the above-captioned cases. The Government of Australia supports these motions and urges the Court to grant them and to grant the request by Gulf and GMCL that the motions for summary judgment be ruled upon before or in connection with the Court's determination of whether to impose sanctions for failure to produce documents whose production is prohibited by foreign law.

The second issue addressed in this brief is whether the Court should grant the motions made by Westinghouse Electric Corporation and Tennessee Valley Authority for the imposition of various sanctions against certain defendants for failure to produce documents whose production is prohibited by foreign law, including Australian law. The Government of Australia urges the Court to deny these motions for the imposition of sanctions.

None of the parties involved in the above-referenced jurisdictional and sanctions motions are Australian nationals. However, sanctions are sought against two companies, Getty Oil Company and Noranda Mines, Ltd., because of their compliance with Australian law.

I. THE INTEREST OF THE AUSTRALIAN GOVERNMENT

The Government of Australia has a significant interest in the above-referenced motions. As is set forth in detail below, the Australian Government has been deeply involved in the control and regulation of the uranium in-

dustry in Australia for many years and has a continuing interest in the viability of that important aspect of the Australian economy. Moreover, the Australian Parliament has taken several actions in the form of legislation and the Australian Government has taken action in the form of Orders issued by the Attorney-General that are directly involved in the sanctions motions now before the Court. Finally, the Australian Government has strongly held views concerning the proper scope under international law of assertions of jurisdiction by American courts in cases arising under the American antitrust laws that involve activities in foreign countries and that may have a detrimental effect on foreign economies.

The parties have fully briefed the legal and factual issues as they see them. This brief will not burden this Court by reiterating those points but will focus on the concerns and viewpoint of the Australian Government as an affected sovereign nation.

II. PERTINENT BACKGROUND

The background of this matter, so far as Australia has been involved in it, is highly pertinent to the Australian Government's position here. At the outset, in order to understand the significance to the Australian national interest in this case, it is necessary to recognize the importance to Australia of mineral developments and mineral exports. Australia is a trading nation and a major raw materials exporter. Australia's export income from minerals and mineral products of 5.2 billion dollars in 1978/79 represented 37 per cent of the total national export income that year. As of June 30, 1979, the reasonably assured uranium resources of Australia recoverable at less than $80 per kilogram represented approximately 18 per cent of the Western World's estimated resources in that category. Following a major review and decisions by the Government in 1977, signifi-

cant new uranium development projects commenced in 1979. In short, the health of its uranium industry and the availability of reliable export markets for that industry have been, and continue to be, of great concern to the Australian Government.

The exportation of uranium from Australia has been subject to control by the Government since 1961 as part of the Government's overall policy and program for supervising important natural resources. This control has been exercised through the Customs (Prohibited Exports) Regulations made under the Customs Act 1901. Since April 10, 1967, the control has formed an integral part of a policy which was announced on that date by the then Minister for National Development.

During the period under consideration in these proceedings, the exportation from Australia of uranium was prohibited except with prior Government approval.[1]

On February 18, 1971, the then Minister for National Development made a statement to the Australian Parliament in which he described the system of export control that was being administered. That statement pointed out that:

> Uranium is not only a valuable mineral and the probable future source of much of the world's future industrial power, but it is also a material of strategic importance. The Government has decided, in common with the Governments of practically all other uranium exporting countries, to maintain a system of export control. [Hansard, 1971 at 257]

The clear importance that countries around the world attach to the national control of the nuclear industry, in-

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[1] The prohibition was provided for by Regulation 11 of the Customs (Prohibited Exports) Regulations and Item 22 of the 9th Schedule to those Regulations.

cluding movements of nuclear materials, is evident from international treaties such as: the Treaty on the Non-Proliferation of Nuclear Weapons,[2] to which Australia and the United States, *inter alia*, are parties; the treaty establishing the International Atomic Energy Agency[3] under the auspices of the United Nations which, *inter alia*, has an internationally accepted responsibility for safeguards on nuclear materials; and United States domestic legislation including the Atomic Energy Act,[4] the Private Ownership of Special Nuclear Materials Act[5] and the Nuclear Non-Proliferation Act.[6]

In 1972 there was a gross over-supply of uranium. The policy of the United States Government, announced on October 13, 1971, continued an embargo that had been imposed upon the enrichment in the United States of foreign uranium for domestic use. That embargo was imposed in 1964 pursuant to section 16 of the Private Ownership of Special Nuclear Materials Act which, *inter alia*, amended Section 161 of Atomic Energy Act of 1954 to include a provision that the U.S. Atomic Energy Commission "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." 42 U.S.C. § 2201(v)(B) (1976).

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[2] 21 U.S.T. 483, T.I.A.S No. 6839, 729 U.N.T.S. 161 (July 1, 1968).

[3] *See* Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3.

[4] 42 U.S.C. § 2011 *et seq.*

[5] Pub. L. No. 88-489, 78 Stat. 602 (1964) (codified in scattered sections of 42 U.S.C.).

[6] Pub. L. No. 95-242, 92 Stat. 120 (1978) (codified in scattered sections of 22, 42 U.S.C.).

Also on October 13, 1971, the United States Government announced its policy to approve the release of 50,000 tons of U308 from the United States stockpile onto domestic markets which further depressed the price obtainable. The decision of the United States Government to continue the embargo effectively denied the United States market, 70 per cent of the then world market, to foreign uranium producers and forced the burden of adjustment of supply and demand to be carried by non-United States uranium producing countries.

In December 1971, the Australian Government deposited an *aide memoire* with the United States Government drawing attention to the Australian Government's concerns about the announcements of October 13, 1971. In part that *aide memoire* stated:

> The Australian Government is most concerned that in their latest statement, the U.S.A.E.C. has proposed the retention of the import embargo until "the latter part of the present decade." The retention of the embargo past the mid 1970's and especially the fact that at this stage there is still no definite date set for its relaxation, could have a dampening effect on the development of Australia's uranium resources, particularly as this industry is characterized by long term supply contracts.
>
> The Australian Government is also concerned that the Commission's proposal for the disposal of fifty thousand tons of surplus uranium concentrates on domestic and foreign markets contains no explicit provisions designed to avoid disruption in markets outside the United States. Consistent with established practice, we would expect the United States administration to consult with interested Governments on stockpile releases where these releases

could have a disruptive effect on the normal commercial trade of foreign suppliers.

The Australian Government would welcome the early announcement of a definite date for the relaxation of the import embargo on foreign uranium to assist the normalization of world trade in this commodity.[7]

The United States Government did not alter its announced policies and, in these circumstances, it was the policy of the Australian Government that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, with respect to the stabilization of prices in the world market which, as a result of the United States Government decision, excluded the United States market. Following inter-governmental discussions in Paris in February 1972, in which the Australian Government participated, to study the supply and demand position for uranium, Australian producers engaged in discussions and on June 27, 1972, the then Minister for National Development specifically endorsed in writing the principles relating to the export of uranium from Australia that had been developed by the uranium industry at a meeting in Johannesburg.

In his statement of February 18, 1971, the then Minister also said:

As with previous policy, all contracts for the export of uranium will be subjected to the approval of the Minister for National Development. This will ensure that the price negotiated for the sale of uranium is satisfactory. Appropriate safeguards, to ensure that the materials exported are used for peaceful purposes only, will be mandatory.

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[7] Aide Memoire to the U.S. Department of State from the Embassy of Australia 1-3 (Dec. 13, 1971).

Subsequent to that statement no export contracts relating to negotiated sales with United States buyers were submitted to the Government for approval, and no shipments of uranium to United States customers received export permission until 1977. The marketing arrangements in question formed part of a fundamentally important Australian Government policy for the control of production and export of Australian uranium.

III. THE UNITED STATES COURTS SHOULD, IN THE INTERESTS OF INTERNATIONAL COMITY, DECLINE TO TAKE OR EXERCISE JURISDICTION IN THIS CASE

The complaints at issue are directed at marketing arrangements which were made by uranium producers, including Australian producers. Four of the defendants against whom judgments in default have been entered are Australian companies. However, in the context of the present summary judgment motions before the Court, the Australian Government's argument here is not directed toward the situation of those companies.[8]

The Australian Government continues to maintain that the extent to which the United States asserts extraterritorial jurisdiction in respect to its antitrust laws is not consistent with recognized principles of international law and it submits this *amicus curiae* brief without prejudice to that position.

The Australian Government's purpose in appearing in support of the movants is two-fold, as follows: first, the

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[8] Because the situation of those companies is not presently before the Court, this brief by the Australian Government does not purport to deal with any of the issues peculiarly applicable to them or to any of the other foreign defendants against whom defaults were entered.

Australian Government wishes to express, as a general matter, its strongly held view that in cases of this nature the United States courts should, in the interest of international comity, apply the standards enunciated in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), and *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), which take into account the sovereignty and interests of foreign nations in passing upon the jurisdictional questions. Second, as has already been indicated, the Australian Government has had a specific interest in the uranium marketing arrangements which are the subject of these lawsuits and has an ongoing concern in the well-being of the international uranium industry, which is being jeopardized by these suits.

From submittals made in this proceeding by the Governments of Canada, France, and South Africa,[9] as well as from the instant brief and other statements made on behalf of the Government of Australia, it is evident that the challenged arrangements were fostered and approved on an international basis by the governments concerned, although excluding the United States market, as a necessary response to an embargo imposed by the United States Government prohibiting the importation into the United States of foreign uranium for domestic use.

Aside from considerations of national sovereignty, there are serious economic concerns which impel Australia to urge the Court not to take or exercise jurisdiction here. As was explained earlier, Australia has considerable reserves of uranium and is potentially a very large supplier of that product to the world market. The initiation and continuation of this massive—and, it is

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[9] These submittals are indexed and reproduced in the Appendix to Motion of Gulf Oil Corporation and Gulf Minerals Canada Limited for Summary Judgments [hereinafter G. Main App.]. *See, e.g.*, G. Main App. at 19, 41, 46-47, 90-91, 175, 181, 260, 264.

submitted unjustified—litigation have thrown much of the world's uranium industry into turmoil and are jeopardizing its future.

As the interdependency of world trade has grown, it has become more and more important that nations take heed of each other's interests when they consider action affecting matters of mutual concern. This is a statement of the principle of international comity, a principle in which the Australian Government deeply believes and which is well established in international law. International comity as an aspect of international law is part of the law of the United States and "must be ascertained and administered by the [American] courts of justice . . . ." *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). The doctrine of international comity is well established in U.S. courts and has been cited by officers of the Executive Branch of Government as a basis for the exercise of prosecutorial discretion not to bring lawsuits in antitrust cases. *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6-7 (1977). In *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit drew attention to the need to weigh the competing interests of the United States and of foreign nations and pointed out that this is especially required in private suits in which there is no opportunity for the Executive Branch to weigh the foreign relations impact before the filing of the suit. Similarly, in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979), the Court of Appeals for the Third Circuit stated that "[w]hen foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."

This approach is also endorsed in Section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). While, in its decision earlier this year involving the instant case, the Seventh Circuit indicated that, in the context of a default judgment, *Mannington Mills* (and *Timberlane*) did not necessarily reflect the law in this Circuit, it stated that "the considerations recommended in that case certainly provide an adequate framework for . . . determination [of whether jurisdiction should be exercised]. . . ." [10]

This viewpoint is also accepted by the Executive Branch of the United States Government and was most recently stated in the Letter from Associate Attorney General John H. Shenefield to the Court (May 6, 1980) in connection with this proceeding. That letter referred to the expressed concerns of the various affected foreign governments and emphasized that "[t]he views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity."

The Australian Government has consistently maintained that its sovereignty would be unjustifiably encroached upon by the operation of U.S. antitrust laws in this case unless, at least, the *Timberlane* case is given full effect in accordance with the principles of international comity.

The Australian Government believes that, if the Court gives the principle of comity the weight to which it is entitled in this case, it will conclude that it should not exercise jurisdiction here. As indicated above, the activities which are challenged in this lawsuit were evi-

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[10] In Re Uranium Antitrust Litigation, 1980-1 Trade Cases (CCH) ¶ 63,183, at 77,897 (7th Cir. 1980).

dently undertaken pursuant to the expressed policies of governments friendly to the United States in the exercise of their sovereign powers. With respect to the situation of the moving defendants, Canada has expressly declared that it initiated and participated in the international uranium marketing arrangements and made the participation therein of all Canadian uranium producers a matter of firm Government policy. Memorandum of Government of Canada as *Amicus Curiae* on Motions to Impose Sanctions for Failure to Produce Documents Whose Production is Prohibited by Canadian Law at 14-16, May 8, 1980.

It is relevant that the challenged arrangements were not directed against the U.S. market and that the responsible U.S. authorities concluded, after an exhaustive grand jury inquiry, that "The evidence did not support the conclusion that the broad uranium cartel had any significance and foreseeable effect on United States commerce, as required by law." Letter from then Assistant Attorney General John H. Shenefield to Senator Howard M. Metzenbaum, G. Main App., at 1042, 1047 (Mar. 31, 1979).

The challenged arrangements were a necessary response to an embargo imposed by the United States Government closing off the U.S. market to foreign producers of uranium.

The Australian Government draws attention to the embargo as being of particular relevance in the application of the *Timberlane* principles. Those principles require some assessment of the significance to the United States of its general antitrust concerns in the maintenance of a competitive international market in the sale of uranium.

It is evident that the United States Government, by imposing the embargo, took the view that U.S. general

antitrust interests in a free market in uranium should, in this instance, be subordinated to the need to protect U.S. producers from foreign competition.

Accordingly, the United States Government satisfied its interests by the imposition of the embargo. In doing so, it necessarily removed the international market for uranium from the free flow of market forces which its antitrust laws were otherwise designed to secure.

Other governments with vital interests in the maintenance of their exports, noting the anticompetitive impact upon the market of United States Government action, took the actions referred to earlier in this brief by way of response.

The restrictive and anticompetitive nature of the embargo was considered by the Executive and Legislative Branches of the United States Government in 1964, as was the possibility of an adverse effect on U.S. international trade relations. *Hearings on Private Ownership of Special Nuclear Materials—1964—Before the Subcomm. on Legislation of the Joint Committee on Atomic Energy*, 88th Cong., 2d Sess. at 336, 407-16 (1964). The United States Government recently has confirmed that its conduct in this regard was anticompetitive. During his January 1980 confirmation hearings for the position of Associate Attorney General, John Shenefield stated:

> First, it is an undoubted fact, as your statement clearly points out, that the cartel had its genesis in a major anticompetitive action by our own Government in walling off a major portion of the world's market to businessmen who had theretofore sold into our market. [*Confirmation Hearings on John H. Shenefield, Nominee, Associate Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st & 2nd Sess. 73 (1979-1980).]

IV. THE COURT SHOULD NOT IMPOSE SANCTIONS ON DEFENDANTS BECAUSE OF THEIR COMPLIANCE WITH FOREIGN LAW

A. Actions Taken by the Australian Government Relating to Discovery Orders Made by Foreign Courts

In November 1976, the Australian Government introduced a bill in Parliament dealing with discovery orders issued by foreign courts. In his Second Reading Speech to the Australian House of Representatives, the then Attorney-General of Australia, Mr. Ellicott, stated that the purpose of the bill was

> "to enable the Government to make orders in situations in which they appear to be needed to ensure that documents in [Australia] are not able to be produced to courts or tribunals in other countries." [11]

He then stated that the immediate need for the legislation was caused by the various proceedings in the United States relating to arrangements alleged to have been made for the marketing of uranium in 1972, including: this case, the Westinghouse/Utilities litigation before Judge Merhige and the then-pending grand jury investigation.[12] The principal justification for the proposed legislation was described by the then Attorney-General as follows:

> Claims are being made that the United States antitrust laws have an operation outside the United States to an extent which is beyond what is generally conceded in international law and beyond what

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[11] Second Reading Speech of then Attorney-General R. J. Ellicott, 102 H Parliamentary Debates, House of Representatives 2907 (Nov. 18, 1976).

[12] *Id.* at 2907-8.

other countries are presently prepared to concede in relation to the pending proceedings.

* * * *

In connection with the present dispute concerning uranium, Canada has recently made a regulation indicating that it rejects the jurisdiction being asserted by the United States authorities as an unjustified invasion of its sovereignty. This is substantially the purpose of the Bill that I am now presenting.[13]

In response to the request by the Australian Government, the Australian Parliament enacted, in November 1976, the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976[14] [hereinafter referred to as the Australian Statute] which was amended in certain technical respects in December 1976.[15]

The Australian Statute, as amended, provides in pertinent part that the Attorney-General may issue an order prohibiting compliance with discovery requests issued by foreign courts.[16]

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[13] *Id.*

[14] Austl. Act No. 121 of 1976 (1976).

[15] Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1976, Austl. Act No. 202 of 1976 (1976).

[16] 4.(1) The Attorney-General shall exercise his powers under this Act so as to impose restrictions only where he is satisfied that—

(a) a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity in proceedings having a relevance to matters to which the laws or executive powers of the Commonwealth relate, being the only proceedings of a foreign tribunal in relation to which the restrictions are to have effect; or

(b) the imposition of the restrictions is desirable for the purpose of protecting the national interest in relation to matters

In December 1976, pursuant to the Australian Statute as amended, the then Attorney-General of Australia issued such an Order prohibiting, except with his consent, compliance with certain types of discovery orders issued by this Court in this litigation because he was:

> satisfied that the imposition of the restrictions specified hereunder is desirable for the purpose of protecting the national interest in relation to matters to which the laws or executive powers of the Commonwealth relate.[17]

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to which the laws or executive powers of the Commonwealth relate.

* * * * *

5.(1) The Attorney-General may, by order in writing, prohibit, except with his consent in writing or as otherwise permitted by the order—

(a) the production in, or for the purposes of, a foreign tribunal of documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia;

(b) the doing of any act in Australia, in relation to documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia, with the intention that the act will result, or where there is reason to believe that the act will, or is likely to result in the documents, or evidence of the contents of the documents, being produced or given in, or for the purposes of, a foreign tribunal;

(c) the giving by a person, at a time when he is an Australian citizen or is a resident of Australia, of evidence before a foreign tribunal in relation to, or to the contents of, documents that, at the time of the making of the order or at any time while the order is in force, are in Australia; or

(d) the production of documents before a tribunal in Australia or the giving of evidence, whether in relation to the contents of documents or otherwise, before a tribunal in Australia, for the purposes of proceedings in a foreign tribunal.

[Austl. Act No. 121 of 1976, §§ 4 & 5(1), *as amended* by Austl. Act No. 202 of 1976, § 4 (1976).

[17] Order by R. J. Ellicott, Attorney-General, AUSTRALIAN GOVERNMENT GAZETTE No. S239 (Dec. 24, 1976).

The production of each document covered by this Order constitutes a separate violation of the Australian Statute. The penalty for each violation by an individual is a fine of $5,000 or imprisonment for six months. A company that violates this Order is subject to a fine of $10,000 for each violation.[18]

As the parties have detailed in their papers, since the issuance of the above-referenced Order by the then Attorney-General, several parties have made one or more requests that the Attorney-General grant his consent to compliance with discovery requests generated by this litigation.

In response to the invitation issued by this Court in Joint Pretrial Order No. 5, the then Australian Ambassador to the United States, Alan Renouf, sent a letter dated May 25, 1979, to this Court. That letter invited this Court's attention to the Second Reading Speech of the then Attorney-General for a statement of the purpose of the Australian Statute. Attached to that letter were copies of the Australian Statute, the amendment to the statute, the Second Reading Speech of the then Attorney-General, the Orders issued pursuant to the Australian Statute, and copies of correspondence from two Attorneys-General denying requests for consent made by Westinghouse, Mr. Paul Riddell and Getty Oil Company. Letter of Alan Renouf to the Court, G. Main App. 109 (May 25, 1979).

As is detailed in the papers submitted by the parties, since the time of Ambassador Renouf's letter to this Court, the Australian Attorney General has considered a number of applications for consent. Most of those applications were denied in toto but on three applications consents were given for the release of some of the documents for which the application was made. Where consent was

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[18] Austl. Act No. 121 of 1976, § 7(1) (1976).

given, it was on the grounds that such production would not be detrimental to the Australian national interest.

Recently this Court granted Getty Oil Company's Application for Letters Rogatory addressed to the Supreme Court of New South Wales, Australia. If a summons is issued by that Court as the first step in obtaining responses to this Court's Letters Rogatory, it is the intention of the Australian Government to intervene in the New South Wales proceedings and to seek a denial of the Letters Rogatory on the ground that responding to them would be a violation of the Order issued by the then Attorney-General pursuant to the Australian Statute.

B. The Proper Legal Standard for Imposing Requested Sanctions

All of the parties and this Court agree that the controlling American legal precedent on the imposition of sanctions in the circumstances now before the Court is *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) (hereinafter *Societe*). Moreover, by letter dated May 6, 1980, the Associate Attorney General of the United States informed this Court of the position of the United States Government that:

> it would be inappropriate, in the absence of bad faith, to inflict punishment against a defendant in [this] case for inability to comply with a discovery order of the court because of a contrary foreign criminal law; the consequences of the absence of complete discovery should be assessed by reference to the multiple factors identified in *Societe Internationale* v. *Rogers* . . . .

This Court analyzed extensively the U.S. Supreme Court's decision in *Societe* as it pertained to the decision

whether to issue production orders in its Memorandum Decision of November 7, 1979, *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979). In that Memorandum Decision, this Court declined to balance the interests of the United States, the relevant foreign countries and the parties as part of its analysis of whether production orders should be issued. *Id.* at 1148. However, this Court did reserve further consideration of communications from foreign governments until the sanctions phase of this case. *Id.* at 1149.

Westinghouse now contends that the Australian Statute and similar laws enacted by Canada and South Africa "are entitled to no weight in this forum, since they were promulgated for the express purpose of thwarting proceedings here and in other United States Courts." Westinghouse Memorandum in Support of Motion for Sanctions Against Defendants Which Have Not Complied With the Court's Order for Production of "Foreign Documents" 37 (Mar. 3, 1980) [hereinafter Westinghouse Memorandum].

In support of this contention, Westinghouse seeks to distinguish the Swiss law in *Societe* from the foreign laws at issue in this case on the ground that: "the laws which imposed a duty of confidentiality on Swiss banks were of general and longstanding application . . . ." *Id.* at 33. According to Westinghouse, because the Australian Statute and the other relevant foreign laws are of recent vintage and are aimed, at least in part, specifically at this case, they should not be accorded the same degree of international comity that the U.S. Supreme Court directed the District Court to accord to the Swiss law in the sanctions portion of the *Societe* opinion. *Id.* at 33-34.

This contention is erroneous for two reasons. First, in *Societe* the U.S. Court of Appeals for the District of Columbia Circuit held that

> Except for the action of the Swiss Federal Attorney, explicitly designed to prevent their production in this case, the documents could have been produced. [*Societe Internationale* v. *Brownell*, 225 F.2d 532, 539 (D.C. Cir. 1955) (footnote omitted).]

Thus, contrary to Westinghouse's assertion, the U.S. Supreme Court was reviewing a situation in which a foreign government took new action directly aimed at the specific litigation under review.

Second, even assuming arguendo that Westinghouse is correct in its assertion concerning the Swiss law in *Societe*, it makes no sense to argue that the U.S. Supreme Court has ruled that in reaching its decision whether to impose sanctions, a trial court should weigh the impact of the existence of an old, foreign statute of general applicability, but should not weigh the impact of a new, directly applicable foreign statute. Nor is it logical to contend that the specific response of a foreign government should be weighed if it is administrative but should not be weighed if it is legislative.

U.S. courts, the U.S. Government and scholars all agree that international comity requires that this Court now conduct a balancing of the various interests in this case, including the interests of the foreign governments, before determining whether to impose any of the requested sanctions.

The most closely related case to the one at bar is *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) which involved some of the parties in the instant case and the Canadian statutes involved in this case. There the United States Court of Appeals for the Tenth Circuit held that "*Societe* calls for a 'balancing approach' on a case-by-case basis," *id.* at 997, and that the district court had abused its discretion in part because

> Canada has a legitimate interest in the disclosure of these documents and the district court erred in failing to consider such interest. [*Id.* at 999]

That court also noted that Section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)[19] is a proper source of guidance as to the factors to be considered in the balancing of interests. 563 F.2d at 997.

As this Court is aware, Section 40 has been "very influential" [20] and has been utilized by several courts when they have been confronted with the issues that now confront this Court. *See, e.g., United States* v. *First National City Bank*, 396 F.2d 897, 902 (2d Cir. 1968).

Moreover, the United States Department of Justice has stated that

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[19] Section 40 provides:

> Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

[20] Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 619 (1979).

> [W]e have increasingly accepted our responsibility as a member of the family of nations to modify investigative practices more appropriate to domestic situations when we contemplate reaching across the water or over our northern border for documents or testimony.
>
> * * * *
>
> What all of this means is that we have stepped back from the confrontation mode of the past. In the future, we see voluntary cooperation as our first resort in obtaining information and evidence located abroad. The new emphasis is a frank recognition of the past limited utility of compulsory process in these cases.

Remarks of Deputy Assistant Attorney General Donald L. Flexner, 1978 Fordham Corporate Law Institute (Nov. 15, 1978).

In its Memorandum Decision, this Court stated its belief that "a balancing test is inherently unworkable in this case." 480 F. Supp. at 1148. It is submitted that, although it is difficult to balance competing sovereign interests, such a balancing is required by the relevant precedents. When confronted with a similar situation, Chief Judge Kaufman of the Second Circuit stated

> the obvious, albeit troublesome, requirement for us is to balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any, Citibank will suffer.
>
> [*United States* v. *First National City Bank*, 396 F.2d 897, 902 (2d Cir. 1968).]

In this matter, difficulties in balancing competing sovereign interests are minimized by reason of statements made by responsible U.S. antitrust authorities.

If the Court considers that there are any difficulties in weighing sovereign interests, as required by the rele-

vant precedents, the Court could seek further information from the United States Government or from foreign governments.

It is precisely because foreign governments have acted in this case both by domestic legislation and through submissions directly to this Court that this Court should weigh their interests in reaching its decision. Commentators have drawn attention to the significance for the international relations of the United States of the situation which would result if, despite the unprecedented level of interest and participation by friendly foreign governments, their interests were ignored. As one American commentator has stated:

> As a general rule, a domestic court should be extremely reluctant to impose sanctions in an international antitrust case, since the discovery rules and substantive laws of the United States are at odds with those of its major trading partners. In the last analysis, the barriers placed on discovery abroad reflect a continuing international hostility to an American theory of jurisdiction that mandates the application of our antitrust law to transactions that seriously affect foreign national economies. . . .
>
> * * * * *
>
> When forced to choose between imposing sanctions for noncompliance and recognizing a foreign nondisclosure law in litigation that is international in scope, American judges must bear in mind that their decisions will inevitably be measured against prevailing standards in the community of nations.

Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 627-28 (1979) (footnotes omitted).]

Westinghouse asserts that the foreign governments involved in this case "have placed this Court in a posi-

tion where it must choose between enforcing the law of the United States or yielding to foreign law." Westinghouse Memorandum at 69. That assertion is incorrect. Under the American law discussed earlier in this brief, this Court has a duty to enforce U.S. law in a manner that takes proper account of the international ramifications of such enforcement. Past developments in this and other litigation involving the international uranium industry have demonstrated that much more is involved in this case than is involved in the enforcement of the U.S. antitrust laws in a purely domestic context. It is those differences between a purely domestic case and this case that should be examined and weighed by this Court when it considers imposing sanctions upon parties who are subject to such sanctions because they refuse to violate the laws of foreign sovereigns. It is submitted that a proper examination and weighing under the guidance of existing precedents and Section 40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) will result in the denial of the motions for sanctions.

V. CONCLUSION

For the foregoing reasons, the Australian Government urges that the motions for summary judgment filed by Gulf Oil Corporation, Gulf Minerals Canada, Limited, Denison Mines, Limited and Denison Mines (U.S.), Inc., be granted and that the motions for the imposition of sanctions for failure to produce documents whose production is prohibited by foreign law filed by Westinghouse and the Tennessee Valley Authority be denied.

Respectfully submitted,

/s/ Mark R. Joelson
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/s/ Joseph P. Griffin
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Attorneys for the
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Dated: May 29, 1980

APPENDIX L

[SEAL]

8/27/3/2

EMBASSY OF SOUTH AFRICA
AMBASSADE VAN SUID-AFRIKA
Washington, D.C. 20008

July 5, 1979

Judge Prentice H. Marshall
Room 2388
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Marshall,

IN RE URANIUM ANTITRUST LITIGATION

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGON LIMITED, *et al.*,
Defendants.

I refer to the invitation contained in clause 7 of pretrial order No. 5 in the above matter to my government to advise your court of its views with respect to the discovery of documents currently in the possession of certain of the defendants, the discovery and production of which may be prevented by the laws of South Africa.

I have been requested by the President of the South African Atomic Energy Board, who is in terms of the South African Atomic Energy Act of 1967 (No. 90 of 1967) as amended, the competent official to respond to your invitation, to inform you as follows:

"(a) except with the prior *written* permission of the Atomic Energy Board, sections 30 and 30A of the

South African Atomic Energy Act, 1967 (No. 90 of 1967) as amended, prohibit the communication, transmission or publication of information at the disposal of any person in the Republic of South Africa which relates to matters more fully described in those sections, to any other person, whether inside or outside the Republic of South Africa. An extract of the relevant provisions of section 30 and 30A is enclosed;

(b) from a study of the records it is evident that the legal proceedings current in the Illinois Court concern matters referred to in section 30A and may also concern matters referred to in section 30;

(c) the Atomic Energy Board is not prepared to give its permission, in terms of the relevant provisions of the Act, for the discovery or production to the plaintiffs in these legal proceedings or to the Court of any documents which are in the Republic of South Africa and which contain or relate to matters referred to in section 30A;

(d) on the application of certain companies operating in the Republic of South Africa, the Board has granted permission to them to publish information concerning the matters referred to in subsections (1) (a) (i), (ii) and (vi) of section 30. These subsections relate to—

"(i) reserves of ores containing any source material, and the locality, extent and source material content of such ores;

(ii) the extent of the output, or potential output, by means of existing installation, of source material or ores containing source material, by any person;

(vi) prospecting or mining for or treatment of ores containing source material, whether in or outside the Republic."

Such information as has been so published, in terms of the permission granted by the Board, may be communicated to the plaintiffs in these proceedings and to the Court;

(e) the Board has not granted and is not now prepared to grant permission for the publication of information concerning those matters referred to in subsections (1)(a)(iii), (iv) and (v) of section 30. These subsections relate to—

"(iii) the price paid by or to any person, whether in or outside the Republic, in respect of source material or ores containing source material, produced or mined in or exported from or imported into the Republic or the territory;

(iv) the terms and conditions of the acquisition, sale, disposal or marketing of such source material or ores by any person, whether in or outside the Republic, or the identity of any party involved therein;

(v) any investigation or research or any discovery or invention relating to the processing, reprocessing, enrichment or use of any source material or special nuclear material or nuclear or atomic energy whether in or outside the Republic."

The Board is accordingly not prepared to grant permission for the disclosure to the plaintiffs or to the Court of such information or for the discovery or production of any documents containing such information which are in the Republic of South Africa;

(f) it is to be noted that in terms of section 34 of the Atomic Energy Act, 1967 (the pertinent part of which is included in the extract enclosed with this letter) a contravention of section 30 or of 30A by any person subject to the jurisdiction of the South African Court is a punishable offence which would lead to a prosecution in the Republic of South Africa and on conviction to the penalties referred to in section 34."

AMBASSADOR

[Attachment omitted.]

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL No. 342

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AS AMICUS CURIAE

I.

INTRODUCTION

This Memorandum is filed by the Government of the Republic of South Africa (hereinafter referred to as "the South African Government") as *amicus curiae*, pursuant to leave granted by the Court in response to a motion under Rule 43 of the Rules of this Court. The South African Government expresses its appreciation to the Court for permitting this filing. The Memorandum urges the Court to defer the damage hearing with re-

spect to the defaulting defendants, tentatively set for September 10, 1979, until the trial on the merits is held as to the appearing defendants herein.

II.

BACKGROUND FACTS

Uranium has two principal uses: the one is use as a base raw material for the production of explosive devices —a use developed more than thirty years ago for military purposes; the other is a use as fuel in nuclear reactors, effectively limiting industrial demand to the requirements of the nuclear power industry. A byproduct of its use in nuclear reactors is plutonium, a material also capable of use for explosive devices. Uranium thus being not only an important source of energy for industrial purposes but also a significant strategic material, its production, marketing and use have been and continue to be subjected to a wide variety of governmental controls throughout the world and to governmental intervention in the marketplace.

1. *The South African Atomic Energy Act No. 35 of 1948*

Since 1948, the mining, production, disposal, export and use of uranium in South Africa has been controlled by the South African Government.

By Section 2 of the South African Atomic Energy Act No. 35 of 1948, which remained in force until 1967, there was vested in the State the sole right to prospect for or to mine uranium (described in that Act as "prescribed material"). By the same Section, the ownership and control of uranium, mined and produced under the authority of the Minister of Mines, was vested, on behalf of the State, in the Atomic Energy Board established by

the Act and of which the Minister of Mines was chairman.

Acting in terms of the powers conferred on it by the Act, the Atomic Energy Board, in 1949, entered into long-term contracts for the supply of uranium to the Combined Development Agency, an agency representing the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland by whom uranium was required for the purpose of their military programs. These supply contracts were negotiated government to government at economic prices and on terms justifying the exploration for and the production of uranium in South Africa. Similar contracts are understood to have been concluded with other major uranium producers elsewhere. The South African contracts with the Combined Development Agency ran out in the 1960's.

2. *The South African Atomic Energy Act No. 90 of 1967*

In 1967, the South African Atomic Energy Act of 1948 was repealed and replaced by the South African Atomic Energy Act No. 90 of 1967 which, as amended from time to time, is currently in force. The purpose of the 1967 Act was to provide for the developments and the changes that had taken place in the nuclear field since 1948, both nationally and internationally.

The Act no longer vests in the Atomic Energy Board, on behalf of the State, the sole right to mine for and to produce uranium (now described as "source material"). Government control over mining and production has, nevertheless, been maintained. Although provision is made for the holder of the rights to uranium, as a base metal, to mine and produce uranium, he is only permitted to do so under the written authority of the Minister of Mines. *Uranium so produced may be sold or exported*

only with the authority of the Minister and then only on such conditions as he, in his discretion, may impose. The Act provides for the delegation of the Minister's powers to the Board or the President of the Board.

The continuing purposes of South African governmental control of the uranium industry are twofold: first to ensure that uranium is exported on terms that prevent the proliferation of military weapons; the second to ensure that, for a country producing a base material needed nationally and internationally as an energy source, the uranium industry should be economically viable.

The legal obligations of South African uranium producers thus derive from the provisions of the Atomic Energy Act. As mentioned earlier, in terms of that Act no person in South Africa may sell uranium except with the written authority of the Minister of Mines and subject to such conditions as he may impose. Although these powers have, in fact, been delegated to the President of the Atomic Energy Board in terms of the 1967 Act, the final decision is always the Minister's since he may amend or rescind any decision of the President or the Board. In authorizing the sale of any uranium in terms of the 1967 Act, it is and always has been the invariable practice of the Minister or the Board to impose as a condition of such sale, the terms, including the price, on which the uranium may be sold. *One effect of this is that no person in South Africa may legally sell uranium at any price or on terms other than those determined by a Minister of the executive Government or under his authority.*

3. *The Industrial Market: South African Governmental Controls*

With the general decline in the 1960's of governmental requirements, the industrial demand for power generation, as it then existed, was insufficient to justify the

maintenance of production by the major suppliers at the levels called for by the earlier governmental contracts. Around the world production was curtailed, prices fell sharply and exploration dwindled.

In succeeding years, the uranium industrial market became characterized by conditions of excess supply, and, in this market, a market aggravated for producers outside the U.S.A. by a U.S. Government refusal to enrich foreign uranium intended for U.S. power plants with a view to protecting the U.S. uranium industry, many non-U.S. producers had no alternative but to enter into distress contracts, both as to quantities and price. World production fell and the going price declined to levels which led to the shutdown of some mines and the curtailment of exploration.

Early in 1972 the South African Government approved the participation of South African uranium producers in meetings with other world uranium producers excluding producers in the United States, the purpose of which was to review the implications for such producers and the nuclear power industry of the market conditions then prevailing.

Subsequent to the 1972 meetings certain criteria designed to regulate production, prices and terms for export of uranium, based on the outcome of the 1972 discussions, were approved by the South African Government and applied by the President of the Atomic Energy Board under authority delegated to him by the Government in terms of the 1967 Act. Under the Atomic Energy Act, in order to obtain the authority to sell South African uranium, producers were legally obliged to observe these criteria.

The adoption of these criteria by the South African Government was deemed by it to be in the national interest in order to stabilize the market and the non-U.S.

uranium industry. At the time, the general view of uranium producers was that, in later years, there would be a substantial growth in the use of nuclear energy and that, in national and international interests, it was important to prevent the threatened disruption and the possible economic collapse of the industry.

Later in the 1970's, there was a turn-around in the demand for uranium reflecting, in part, an upward revision of nuclear power programs in most of the industrialized nations. This came at a time when production in the major producer countries was still at a low level. The market was further confused by the disclosure that the Westinghouse Electric Corporation (Westinghouse) had made large forward uncovered sales. Prices rose rapidly and world production rose in response to the rising demand and price increases.

The South African Government has continued to maintain revised criteria relating to the sale of uranium from South Africa since the national interest in uranium is considered so important.

III.

THE INTEREST OF THE SOUTH AFRICAN GOVERNMENT

The South African Government has a direct and significant interest in the litigation now pending in the Illinois District Court.

Uranium is one of South Africa's major exports. Having played an important role in supplying the military needs of the United States and British Governments in the 1950's and the 1960's, since then South Africa has supplied a large part of the uranium needs for the generation of nuclear power of a number of Western and Far Western industrialized countries, including the United States. South African exports of uranium contribute

very considerably to the economic well-being of the South African mining industry and of the country. Currently average annual exports of uranium amount to approximately $575,000,000. In addition, new export orders concluded over the past year involving short term and extended deliveries of uranium were in the approximate amount of $1,495,000,000.

Amongst the defendants in this action are Anglo American Corporation of South Africa, Ltd. (AAC) and Nuclear Fuels Corporation of South Africa, Ltd. (NUFCOR), two South African companies incorporated and registered according to South African law. Neither AAC, as such, nor NUFCOR is or ever has been a uranium producer, and AAC has never sold uranium. AAC is a major South African investment corporation, controlled by South African individuals and corporations, which has interests as a shareholder in companies concerned in the precious metals industries, in the uranium and coal industries, and in industrial and commercial undertakings. NUFCOR is a wholly owned South African company which has acted for many years, and continues to act, as marketing agent for South African uranium producers.

A default judgment of liability has been entered in this action against AAC and NUFCOR, together with certain other non-U.S. companies, by reason of their failure to enter appearance to defend this suit.

Following the decision on default, the South African Government, in response to the invitation in Pretrial Order No. 5, advised the Court that the South African Atomic Energy Board, acting in terms of the powers conferred on it by the South African Atomic Energy Act 1967, was not prepared to authorize the production of documents or disclosure of information in South Africa connected with the discussions or meetings which took

place between uranium producers in the period 1972 to 1975 (whether in or outside South Africa) concerning the export of uranium or the prices or terms on which uranium was sold or exported—a decision endorsed by the South African Government. (Letter from the Ambassador of South Africa to the United States, dated July 5, 1979.)

The Court has now set the default damage hearing for September 10, 1979.

IV.

DEFERRAL OF DAMAGE HEARING

In the view of the South African Government, the hearing on damages against the defaulting defendants should, at the least, be deferred until after the trial on the merits of claims against the appearing defendants. Indeed, as the *amicus curiae* brief filed by the British Government herein presents at some length, there is a serious question as to whether any damage awards against the defaulting defendants would be appropriate.

The South African Government respectfully wishes to associate itself in general with the views already before the Court expressed by the Australian, British and Canadian Governments, and with the legal authorities referred to in their briefs now before the Court.

Specifically, with respect to the South African defaulting defendants, in deciding how to respond to legal actions brought against them by Westinghouse, AAC and NUFCOR faced difficult problems of fact and law. Neither were uranium producers as such. The participation by the South African uranium producers (in which AAC held interests or which were represented by NUFCOR in marketing operations) in discussions or association with other non-U.S. producers directed at stabilizing the non-U.S. industries, was not contrary to South African

law and the criteria adopted to regulate production prices and terms for the export of uranium from South Africa was sanctioned by the South African Government and carried out in terms of South African law.

To have entered appearance to defend these actions could have involved acceptance of the extra-territorial jurisdiction of U.S. Courts—a course of action which would not have been regarded favorably by the South African Government. The South African defendants therefore faced the unpalatable alternatives of either failing to enter appearance and thus being in default, or entering appearance and thereby submitting to the Court's jurisdiction only to be faced with the probability of default thereafter as a result of the provisions of South Africa's legislation restricting access to information on atomic energy and related matters.

In the view of the South African Government, the claim that the difficulties facing Westinghouse are attributable to the marketing criteria lawfully adopted by non-U.S. uranium producers is seriously questionable, for the probable reality is that these difficulties are attributable to the impact of world events, such as the OPEC action in 1973, on the uranium market and the unsound commercial practice followed by Westinghouse of selling, without forward cover, a quantity of uranium greater than the level of annual world production at the time.

In the light of this, and considering the severe financial impact on the financial affairs of South African companies and the adverse effect on the economy of South Africa of the possible imposition of heavy damages on these defaulting companies, determination of an award at this time, it is submitted, is inappropriate.

On this point the South African Government, in order not unnecessarily to further burden the record, incorporates by reference the "ARGUMENT" of the *amicus*

curiae brief of the British Government at pages 15 through 19.

On the broader question, having already endorsed the views submitted by the Australian, British and Canadian Governments, the South African Government will merely add:

Having regard to the conflict of national and international laws and of legal opinion, the South African Government considers there is no legal ground or justification for the extraterritorial application of U.S. antitrust laws to South African companies whose association and activities with other uranium producers directed at stabilizing the industry outside the U.S. was not only lawful in terms of South African law but considered by the South African Government in its national interest.

The South African Government respectfully suggests, furthermore, that such extraterritorial application to non-U.S. uranium producers, acting lawfully in terms of their own national laws and international law, would constitute a challenge to the sovereignty of nations and could disturb friendly relations with the United States. In the view of the South African Government, the legal and economic implications of such application would extend beyond the business activities and financial position

of the South African companies concerned and the uranium industry with which they are associated.

Respectfully submitted,

/s/ Harry Tyson Carter
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Date: August 16, 1979

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL No. 342

IN RE URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

INTRODUCTION

This Brief is filed by the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the British Government") as *amicus curiae*, pursuant to the leave granted by the Court on July 18, 1979. The British Government wishes to express its appreciation to the Court for permitting

the filing of this *amicus curiae* Brief in connection with this important matter.

This Brief urges the Court to defer the damage hearing with respect to the defaulting defendants tentatively set for September 10, 1979 until the trial on the merits is held as to the appearing defendants.

INTEREST OF THE BRITISH GOVERNMENT

The British Government was not involved in the events that led to this lawsuit inasmuch as it played no role in the initiation of or conduct of the alleged uranium cartel. Uranium is not produced in the United Kingdom. Nonetheless, the British Government has a significant interest in and concern over this litigation. Because of the international ramifications of the disputes posed in this litigation, significant decisions made in its course are likely to have serious effects on international trade and investment well beyond the confines of the uranium industry. Moreover, uranium is itself of major importance to the British Government for energy and national defense purposes. Another reason why this proceeding concerns the British Government is that it invokes the extraterritorial application of U.S. antitrust law to activities carried on outside the United States by citizens of the United Kingdom. The British Government has consistently maintained that such assertions of jurisdiction are inconsistent with international law and unfairly subject British enterprises to the sharply conflicting demands and policies of different sovereign governments.

The specific issue before the Court which prompts this *amicus curiae* Brief is the possible imposition of damages, perhaps amounting to hundreds of millions or even billions of dollars,[1] on the defaulting defendants, includ-

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[1] *See* Transcript of Proceedings, March 27, 1979, at 8 and June 20, 1979, at 11.

ing two which are British corporations with British shareholders and management, Rio Tinto-Zinc Corporation Limited and RTZ Services Ltd., when there has been no trial on the merits with respect to the appearing defendants (the alleged co-conspirators). RTZ and its direct and indirect subsidiaries and affiliates [2] are of major significance to the British economy, which is highly dependent on international trade. They have interests throughout the world in almost every major metal and fuel including aluminum, borax, coal, cobalt, copper, gold, iron ore, lead, manganese, nickel, oil, silver, tin, uranium, zinc, and others. They provide all of the United Kingdom's current supplies of uranium. Because RTZ accounts for much more than half of the U.K. owned mining industry's turnover, it is important to the British Government. RTZ's considerable technical and financial capabilities are themselves valuable assets to the United Kingdom's economy. If RTZ were to face severe financial difficulties, or even a significant reduction in its level of activity, this could have major adverse economic consequences for the United Kingdom.

In sum, if Westinghouse, through an enormous default judgment in this very controversial case, is given a claim which it may seek to enforce against RTZ's assets, a major portion of the British owned mining interests throughout the world will be in jeopardy. Such a result, when a later trial involving the appearing defendants may prove that there was no actionable conduct or no significant damage to Westinghouse, would unjustifiably and severely injure the general economic interests of the United Kingdom, as well as the particular British companies concerned and their shareholders. This is a result which the British Government urges the Court not to permit.

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[2] Hereinafter referred to as RTZ.

STATEMENT OF THE ISSUE

The issue addressed in this Brief is whether the Court should defer the damage hearing with respect to the defaulting defendants until the trial on the merits is held as to the appearing defendants.

STATEMENT OF THE FACTS

Only such facts shall be recited here as are pertinent to the present issue. The statement will, in the interest of not burdening the Court unnecessarily, be only a brief summary.

I. The Circumstances Leading To The Formation Of The Alleged Cartel

Uranium has potential for military use and, commercially, is widely used as a constituent of nuclear fuel for the operation of nuclear power stations. The nations which are the principal producers of uranium include the United States, Australia, Canada, South Africa, and France.[3] The United States was, during the relevant period, both the largest consumer and the largest producer of uranium.

In 1964 the United States enacted the Private Ownership of Special Nuclear Materials Act which, *inter alia*, protected the commercial interest of the domestic producers of uranium by barring U.S. enrichment services to uranium of foreign origin intended for domestic reactors. 42 U.S.C. § 2201(v) (1976). The embargo on the utilization of foreign origin uranium was reaffirmed in 1966 by regulations of the Atomic Energy Commission (AEC) implementing the 1964 legislation. 31 Fed. Reg. 16,479 (Dec. 23, 1966). Despite the protests of foreign

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[3] *See, e.g.*, Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 121 (1977).

governments, this total ban on the use of foreign uranium in U.S. domestic reactors continued until 1977 and is only now in the process of being phased out under regulations adopted in 1974. Because the U.S. market represented at the time some three quarters of the world market, other U.S. policies relating to uranium supply, including the AEC's "tails assay" approach, also worked to depress significantly the prospects for foreign uranium producers. Meanwhile, U.S. companies, benefiting from this protection in their home markets, continued to sell uranium outside the United States in competition with foreign uranium producers.

These circumstances caused great concern and a reaction from the major producing nations, all of which closely controlled the conditions, including the price, on which uranium was exported. As the Government of Canada has stated in its memorandum to this Court as *amicus curiae*,

> In an effort to minimize the disruptive effects threatened by United States policies, the Canadian Government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangement. . . . The purpose of the international marketing arrangement was to allocate the meager non-U.S. demand among the non-U.S. producers, and to stabilize prices for a transitional period. . . . [T]he participation of all Canadian uranium producers in this marketing arrangement was a matter of firm Canadian Government policy. [Memorandum of Government of Canada as Amicus Curiae, at 3-4.]

The French Government has declared, with respect to the activities of the French entity, URANEX, which have been challenged by TVA, that, at all time, URANEX's participation in meetings and arrangements involving uranium producers was under instruction from

appropriate French Government authorities and in furtherance of French Government policies which had, in turn, been prompted by the U.S. Government actions foreclosing the U.S. market to non-U.S. uranium producers.[4] In response to a request from the U.S. Government for an indication of the extent of Australian Government approval of the activities of Australian uranium producers (in the context of a request by the U.S. Government for relaxation of orders made under the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act) the Australian Government sent a Note to the U.S. Government.[5] The Note contained the following statement: "[i]t will be apparent from the foregoing information that the arrangements which were made by Australian uranium producers for the marketing of Australian uranium were made with the approval of the Australian Government." In addition, the Australian Government has communicated its views directly to this Court in a letter from Ambassador Renouf dated May 25, 1979. It is apparent, therefore, that the activities challenged in this lawsuit were in implementation of significant and clearly expressed policies of nations friendly to the United States, which the defaulting defendants, including RTZ, were expected to recognize and to abide by.

II. Relevant International Legal Background

It has long been the policy of the British Government to cooperate with the United States Government and the

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[4] Position of Government of France—Uranium Antitrust Litigation, Exhibit 1 of URANEX's Motion to Dismiss in No. 78 C 3280. This reference to the position of the French Government is made under the terms of the current Protective Order in this litigation.

[5] Note No. 13/78, to the U.S. Secretary of State (March 23, 1978). The Australian Government has consented to this Note being made publicly available under appropriate procedures.

United States courts in civil and commercial litigation [6] and in matters relating to the detection and adjudication of conduct which is deemed under the laws of both countries to be improper, including in the economic field: fraud, tax evasion, and smuggling, in relation to which no jurisdictional difficulties normally arise. Moreover, the British Government has consistently taken the position that British enterprises engaged in transnational business operations should comply with the laws and governmental policies of the countries in which they transact business. Unfortunately, the instant case falls within one of the few legal areas in which there is a significant disagreement between the British and U.S. views as to the appropriate legal standards.

The following brief recitation of the thirty-four year old disagreement between the U.S. Government and the British Government is not designed to persuade the Court either that the British Government's position as to this dispute is correct or that the Court should not apply U.S. legal precedents. However, it is submitted that the Court should take into account this central and longstanding international disagreement regarding fundamental legal principles in considering the conduct of the defaulting British defendants.

The basic point of disagreement is whether the following statement in the 1945 *Alcoa* case should be unilaterally applied by the United States to international antitrust matters:

> [I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has con-

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[6] For example, the U.S. and U.K. Governments are parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444.

> sequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize. [*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945)]

Until the recent *Timberlane*[7] and *Mannington Mills*[8] cases, the U.S. courts accepted this statement, often referred to as the "effects" or "intended effects"[9] test of subject matter jurisdiction, as correct. However, after these decisions it is clear that the "effects" test as formulated in *Alcoa* is no longer to be accepted by U.S. courts as "settled law." In fact, the Assistant Attorney General in charge of the Justice Department's Antitrust Division stated in August 1978:

> The list of factors suggested [in *Timberlane*] suggests that parties and the Court must now give consideration to all of the factors that . . . have been argued so vigorously by the foreign parties in past controversies. . . . This new role for the district court is long overdue. . . .[10]

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[7] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611-12 (9th Cir. 1976) ("The effects test by itself is incomplete because it fails to consider other nations' interests."); *accord*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 427-29 (9th Cir. 1977) (Lanham Act).

[8] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) ("In *Timberlane* . . . the Ninth Circuit adopted a balancing process in determining whether extraterritorial jurisdiction should be exercised, an approach with which we find ourselves in substantial agreement.") *cf.* Industrial Investment Development Corp. v. Mitsui & Co., 1979-1 Trade Cas. ¶ 62,586 (5th Cir. 1979).

[9] These shorthand phrases originated with the language in *Alcoa* that agreements would be unlawful "though made abroad, if they were intended to affect imports and did affect them." 148 F.2d at 444.

[10] Remarks of John H. Shenefield, "Extraterritorial Impact of U.S. Antitrust Laws", before the ABA Section of International Law (Aug. 9, 1978), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,386, at 55,857.

It has long been the position of the British Government that, in the context of the application of the U.S. antitrust laws to conduct outside the United States by non-U.S. citizens, the "effects" test is inconsistent with international law. This is so in relation to civil antitrust treble damage cases brought by private persons, as well as criminal or civil antitrust litigation instituted by the U.S. Government, since the former are to be deemed to be "penal" actions for the purposes of international law.[11]

One of the most succinct statements of the British Government's position is the following passage from the submission of that Government's then Attorney-General to the House of Lords in *In re Westinghouse Electric Corporation Uranium Contracts Litigation*:

> No authority supports the United States claim to exercise penal jurisdiction over the actions outside the United States of non-United States nationals or companies of another country's nationality.
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> * * * *

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[11] In his submission to the House of Lords in *In re Westinghouse Electric Corporation Uranium Contracts Litigation* (hereinafter cited as "House of Lords Report"), the then British Attorney-General stated:

> Anti-trust proceedings are being simultaneously [with the grand jury investigation] carried on in the Illinois court. The claim is for treble damages. Although the proceedings are in form civil, there is a strong penal element in them . . . . Even though the sanction of enforcement consists of a private remedy for multiple damages, the matter is still penal. [[1978] A.C. 589-90]

For the Court's convenience the entire official report of the then British Attorney-General's submission to the House of Lords is attached hereto as Exhibit A.

For background on this point *see* Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957); Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 466-74 (Supp. 1935).

> The application of the effects doctrine to found jurisdiction in penal matters is regarded by Her Majesty's Government as being particularly objectionable in the field of anti-trust legislation. (1) The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognized as unlawful. Offences in the anti-trust category are wholly different from such offenses as piracy which are universally regarded as unlawful. (2) The assertion of extraterritorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states. (3) The effects doctrine is particularly uncertain in operation when applied in the field of anti-trust legislation. As the United States courts have recognized, almost any limitation of competition effected between economic units acting outside the United States may have repercussions, direct or indirect, on the economic interests of the United States; so the potential application by United States legislation of the United States courts of the effects doctrine introduces some insecurity into the relations of corporate bodies carrying on business outside United States jurisdiction; this is highly undesirable. (4) The penal sanctions attaching to violations of United States anti-trust legislation include severe criminal penalties and penal damages. In this respect no valid distinction can be drawn between proceedings brought by the State and those brought by private individuals to enforce a monetary penalty.[12]

Since 1945 the British Government has stated this position in various communications to the U.S. Government.[13] Moreover, the British courts, including Britain's

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[12] House of Lords Report, *supra* note 11, at 594.

[13] *See, e.g.*, Aide Memoire of March 4, 1960, *infra* note 15; British Embassy, Note No. 196 to the U.S. Dept. of State (July 27, 1978).

highest judicial body, the House of Lords, have taken similar positions.[14]

Because of this basic disagreement over the international legality of assertions in antitrust cases of jurisdiction based on the "effects" tests there have been well known disagreements over the proper scope of discovery

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[14] In the unanimous House of Lords' *Westinghouse* decision, Lord Wilberforce noted that:

> The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive . . . they have, as I have stated, no difficulty in doing so. [[1978] A.C. at 617]

See also British Nylon Spinners v. Imperial Chemical Indus. Ltd., [1953] 1 Ch. 19, 25 (C.A. 1952), *made permanent*, [1954] 1 Ch. 37, in which the then Master of the Rolls observed:

> If by that passage the judge [Judge Ryan of S.D.N.Y.] intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign power effective to remove (as he said) "harmful effects on the trade of the United States." I am bound to say that, as at present advised, I find myself unable to agree with it.
>
> Questions affecting the trade of one country may well be matters proper to be considered by the government of another country. Tariffs are sometimes imposed by one country which obviously affect the trade of another country, and the imposition of such tariffs is a matter for the government of the particular country which imposes them. And if that observation of the judge were conversely applied to directions designed to remove harmful effects on the trade, say, of Great Britain or British nationals in America, I should myself be surprised to find that it was accepted as not being an intrusion on the rights and sovereign authority of the United States.

requests [15] and remedy orders [16] issued by U.S. courts in international antitrust cases.[17] The importance of these disagreements to the British Government was demonstrated in 1964 when the British Parliament passed the Shipping Contracts and Commercial Documents Act which authorizes a Minister of the British Government

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[15] For example, on March 4, 1960 the British Government filed an Aide Memoire with the U.S. Department of State objecting to subpoenas duces tecum issued to British companies as part of a grand jury investigation of alleged restrictive practices by international shipping conferences. That Aide Memoire contained the following statement:

> Insofar as such documents relate to trade between Mexico and Europe, Her Majesty's Government cannot accept that this is a matter in respect of which the United States is entitled to exercise jurisdiction, notwithstanding that it may have some effects upon the trade of the United States.

This same grand jury investigation resulted in protests from Canada, Denmark, France, Italy, Japan, the Netherlands, Norway, the Philippines, Sweden and West Germany. *See* In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 318 (D.D.C. 1960); 42 DEPT. STATE BULL. 501 (1960).

[16] *Compare* United States v. Imperial Chemical Indus. Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952) *with* British Nylon Spinners v. Imperial Chemical Indus. Ltd., *supra* note 14. *See* Kahn-Freund, *English Contracts and American Antitrust Law: The Nylon Patent Case*, 18 MODERN L. REV. 65 (1955).

[17] Since 1945 at least 19 other foreign governments have protested American assertions of jurisdiction in international antitrust cases. *See, e.g.*, Remarks of Donald L. Flexner (Deputy Assistant Attorney General, Antitrust Division), "Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms", before the 1978 Fordham Corporate Law Institute (Nov. 15, 1978); A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 365-72 (2d ed. 1970); Haight, *Extracts from Some Published Material on Official Protests, Directives, Prohibitions, Comments, etc.* in REPORT OF THE 51ST INTERNATIONAL LAW ASSOC. CONFERENCE 565-92 (1964); SPECIAL COMMITTEE ON ANTITRUST LAWS AND FOREIGN TRADE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NATIONAL SECURITY AND FOREIGN POLICY IN THE APPLICATION OF AMERICAN ANTITRUST LAWS TO COMMERCE WITH FOREIGN NATIONS 12-18 (1957).

to order British citizens not to comply with certain discovery requests from foreign countries if the Minister determines that the request "would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom." [18]

It is also the policy of the British Government that its citizens, both natural and corporate, should not show disrespect to foreign governments and judicial courts. The British Government has not participated in the decisions made by the defaulting British defendants regarding this litigation. However, it is submitted that a most important factor in their decisions not to appear before this Court can be surmised from a review of British law and that, in light of applicable British law,

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[18] Shipping Contracts and Commercial Documents Act 1964, c. 87, § 2(1)(b). During the debate on the bill in the House of Commons the then British Attorney-General stated:

> What I think the Bill ought not to do, and what it certainly does not do, is to say that, because the Americans claim an extensive jurisdiction which, in our view, is much wider than anything they are entitled to, we should claim an equally extensive jurisdiction and try to control things that are not within the province of this Parliament. . . . We must assert firmly and plainly that there are certain matters which, in international law, are for the British Government and for the British courts and which should be dealt with within British jurisdiction. [698 Parl. Deb. H.C. (5th ser.) 1272 (15 July 1964)]

In April, 1979 the British Government, pursuant to the Shipping Contracts and Commercial Documents Act, ordered the defaulting British companies not to produce documents located in the United Kingdom or to supply information compiled from such documents. The grounds for this action were that a requirement for the production of documents from the United Kingdom in penal proceedings relating to activities of non-U.S. persons outside the United States would involve an infringement of U.K. jurisdiction. As the Court is aware, several other foreign countries have similar laws. *See generally* Note, *Foreign Non-disclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L. J. 612 (1979).

their nonappearance should not be viewed as an expression of disrespect to this Court.

As is explained in greater detail in the Memorandum of the Solicitor to the U.K. Department of Trade, attached hereto as Exhibit B, when British courts are requested to enforce the judgments of foreign courts, they apply British legal standards to determine whether the foreign court had personal jurisdiction over the British defendant.[19] However, even if under British law the foreign court lacked personal jurisdiction over the British defendant, if the British defendant submitted itself to the jurisdiction of a foreign court by participating in a case brought against it, an adverse judgment against the company will be, subject to very limited exceptions, incontestable in a British court.

Given this situation under British law a British defendant in an American antitrust case faces a profound dilemma. The British company may submit itself to the jurisdiction of an American court which will adjudicate its conduct under standards not accepted by the British Government, the British courts, or the British public. In such a litigation it may find itself condemned and punished very severely financially for conduct that was completely legal where it occurred. In addition, because the company had submitted itself to the jurisdiction of the American court, the judgment against it may well be enforceable in British courts against British assets.

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[19] It should be noted that U.S. Courts follow the same approach. *See, e.g.*, Cherun v. Frishman, 236 F. Supp. 292, 296 (D.D.C. 1964) ("[T]he issue of whether the foreign court had jurisdiction over the United States national should be determined by our own standards of judicial power as promulgated by the Supreme Court under the due process clause of the Fourteenth Amendment."); Bank of Montreal v. Kough, 430 F. Supp. 1243 (N.D. Cal. 1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, Comment d (1971); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 59, at 213 (1962) (citing British and American cases).

Given such a prospect, a British company may choose the other horn of the dilemma and not submit itself to the jurisdiction of the American court even though by this action it gives up its right to defend the case and perhaps prevail in the American court and even though it may thereby appear to be disrespectful to the American Court.

It is submitted that this discussion of the broad international legal context of this litigation and of the resulting dilemma faced by the defaulting British defendants is directly relevant to and supports the British Government's request that the scheduled hearing on damages against the defaulting defendants be deferred until the trial of this case. The next section of this Brief addresses in more detail the arguments in support of the British Government's request.

ARGUMENT

I. The Hearing On Damages Against The Defaulting Defendants Should Be Deferred Because Of The Serious International Implications Of The Entry Of An Enforceable Default Judgment

By various means, the Governments of Australia, Canada, France, Switzerland and, now, the United Kingdom, have expressed their views on aspects of this case to the Court. It is clear that the defaulting defendants have been caught in a conflict of national policies and legal standards which they are incapable of resolving. This conflict is not of their making because they were seeking to comply with the laws and policies of each country in which they did business. Nonetheless, a private citizen of another country (the United States) now seeks to recover damagse on a scale that might bankrupt them because their conduct, although consistent with the laws and policies of the countries in which it occurred, may have been inconsistent with American law. For a court of one nation to impose extensive, and perhaps fatal,

economic sanctions against the citizens of other nations caught in such a conflict would be a severe step even after a full-blown adversary proceeding involving proof of liability and of damages. To impose such sanctions when hearings on liability and damages as to the appearing defendants have not been held would be, it is submitted, totally inappropriate.

It is beyond doubt that if this Court agrees that Westinghouse is entitled to substantial damages from the defaulting defendants, those defendants, their shareholders and, perhaps, the economies of their home countries, will suffer a significant blow. If Westinghouse attempts to execute such a damage award in the United States and elsewhere, there will be grave disruption in the uranium industry which may spread to wider financial and commercial circles. Such disruption could hardly fail to have serious effects on the defense and energy policies of several nations, including Britain, which depend on the availability of uranium as a raw material.

The British Government does not here argue with the propriety of this Court's ultimately entering a judgment against the defaulting defendants. It does, however, urge the Court not to embark upon a course which will have such far reaching repercussions until the issues have been fully tried.

Given the potential international effects of this litigation, the foreign governments involved have themselves acted with significant restraint. Their actions have been carefully limited to those minimum steps they believed necessary to protect their national interests. However, if large, enforceable default judgments are entered and Westinghouse attempts to execute them, there will undoubtedly be strong adverse public reaction in the affected foreign countries. As Associate Attorney General Egan noted in 1977:

> An unyielding and unresponsive antitrust policy, heedless of considerations of comity, could seriously disrupt United States foreign policy.

> It could weaken vital alliances.
>
> It could provoke damaging retaliation. . . .[20]

The Court will have the opportunity of assessing the proper weight to be given under U.S. law to foreign governmental interests and other international considerations in adversary proceedings, involving the appearing defendants. In the interest of international comity the highly prejudicial step of assessing damages in respect to non-appearing foreign defendants should not be taken without this being done.

As Rio Algom Corporation notes in its "Memorandum in Support of its Motion to Vacate the Setting of a Pretrial Damage Hearing Against the Defaulting Defendants," nine of the appearing defendants have raised affirmative defenses based upon the act of state or foreign sovereign compulsion doctrines. *Id.* at 23. In evaluating these defenses, the Court will be analyzing the factors set forth in *Timberlane*, *supra*, *Mannington Mills*, *supra*, and the Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965). As the Ninth Circuit pointed out in *Timberlane*, a cognizance by the Court of the possible international implications of its actions

> is especially required in private suits . . . for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed. [549 F.2d at 613]

Very recently an official of the Justice Department's Antitrust Division, in describing the *Timberlane* case, stated:

> The Antitrust Division shares the Court's view that conflict of laws principles are an important ele-

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[20] Address by Michael J. Egan before the International Bar Association Business Law Section 7-8 (Nov. 3, 1977).

> ment in the legal analysis when American antitrust law may invade another sovereign's sphere of jurisdictional competency. For it commits our courts to the same balancing of elements which the Antitrust Division must perform in exercising its own prosecutorial discretion in foreign commerce cases. Despite the frustrations and complexities involved, the interdependence of the world economy and legitimate interests of foreign sovereigns must be considered in private as well as public antitrust enforcement actions under American law. [Remarks by Carl A. Cira, Jr. (Assistant Chief, Foreign Commerce Section, Antitrust Division), "Future Directions in American Antitrust Law and Policy" 12 (June 23, 1979).]

It is very pertinent in this case involving international ramifications that the U.S. Government has considered the various factors relating to the uranium controversy and has chosen to do no more than bring a single count misdemeanor information against one U.S. company. According to Assistant Attorney General Shenefield, "I rejected a broader case because in my view the evidence did not support the conclusion that the broad uranium cartel had a significant and foreseeable effect on United States commerce, as required by law." Letter from John H. Shenefield to Honorable Howard M. Metzenbaum at 6 (March 31, 1979).[21] Moreover, after a lengthy and thorough investigation, a grand jury convened by the Antitrust Division to investigate the alleged uranium cartel took no action at all against any of the alleged participants.

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[21] A copy of this letter is attached as Exhibit C to "Memorandum of Defendant and Counterclaimant Gulf Oil Corporation and Defendant Gulf Minerals Canada Limited in Support of Motion to Defer and Consolidate the Proposed Rule 55(b) Damages Fact Finding Proceeding with the Trial of The Case on The Merits" (July 10, 1979).

II. The Hearing On Damages Against The Defaulting Defendants Should Be Deferred On The Basis Of The Contentions Which The Appearing Defendants Have Briefed In This Court

The contentions advanced by the non-defaulting defendants in their papers requesting a delay of the hearing on damages against the defaulting defendants appear to be well founded in U.S. law and to be persuasive. The British Government will not burden the Court by detailing these contentions here. Suffice it to say that, while none of the non-defaulting defendants attempts to speak for the defaulting defendants, they each strongly maintain as a general matter that the plaintiff will be unable to prove its case as to either liability or damages. There is, it appears, substantial evidence supporting the defense contentions, including the argument that the plaintiff cannot prove that any significant damage was sustained by it as a result of the alleged cartel. Every indication is, rather, that Westinghouse's difficulties were caused by its own speculative and unsound commercial practices.[22] Certainly, it would be incongruous and manifestly unfair to bring about a result whereby some of the defendants are saddled with crushing damage awards when the facts later adduced may well establish that the plaintiff's case was without merit. Furthermore, a deferral of the damages hearing would hardly cause Westinghouse prejudice comparable to that which an award of damages on an *ex parte* basis would cause, as outlined above.

It was this type of result that the United States Supreme Court attempted to preclude and which it described as "unseemly and absurd" in *Frow* v. *De La Vega*, 82 U.S. 552 (1872). In its January 3, 1979 opinion this Court stated that changes in federal procedure require certain modifications of the *Frow* rule, and that a balanc-

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[22] *See, e.g.*, Joskow, *supra* note 3, at 143-50.

ing test should be applied in determining the proper procedure in a particular case. Under either the *Frow* rule or the balancing approach, the British Government believes that it is clearly appropriate in the circumstances of this case to defer the damage hearing against the defaulting defendants.

CONCLUSION

For the foregoing reasons, the British Government urges the Court to defer the damage hearing as to the defaulting defendants until the trial is held with respect to the appearing defendants.

Respectfully submitted,

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Date: August 3, 1979

APPENDIX O

MEMORANDUM

POSITION OF GOVERNMENT OF FRANCE URANIUM ANTITRUST LITIGATION

This statement is transmitted to the United States Government by the Government of France in order that the appropriate United States authorities be informed of the risk of infringement of French sovereignty arising out of the litigation commenced in November, 1977 by the U.S. Tennessee Valley Authority against, among others, URANEX which has acted according to French Government's policy in matters pertaining to the marketing of uranium. We submit this suggestion in order to request the assistance of the Department of State in obtaining a dismissal of the action insofar as it pertains to URANEX.

It is the view of the Government of France that this litigation represents an attempt to impose a judicial solution upon matters which if considered by the US Government as being issues, would be proper for resolution only on a government-to-government basis. We informed the United States of the governmental nature of these problems in our communique of March 1978 in connection with the then ongoing grand jury relating to uranium.

We were pleased that no indictments were returned by the grand jury. However, the continuation of the civil proceedings by another agency of the US Government, the TVA, represents an equivalent effort to interpose the US Courts in a nation-to-nation problem. We reiterate the suggestion by the Government of France that, if discussions on matters pertaining to, an alleged uranium marketing organisation are considered necessary they

should take place directly with the US Government and the governments of other nations.

As is summarized below, at all times URANEX's participation in meetings of uranium producers was under instructions from appropriate French authorities. To attack URANEX's conduct is in fact to attack the conduct of the Government of France. The courts of another nation cannot be permitted, in matters so sensitive, to inquire into the motivations or conduct of a sovereign nation—or those acting under their instructions.

Thus, in December 1977, the French Ministry of Industry and Commerce acting pursuant to its authority, prohibited French uranium mining companies from appearing or participating in any court proceeding (including the TVA action) that seeks to review, under US antitrust law, the conduct of French entities relating to the international uranium market.

The Government of France is concerned that URANEX's failure to appear could subject URANEX to a judgment which would be inconsistent with principles of international comity. At the same time the Government of France is concerned that submission to jurisdiction by URANEX would result in an unauthorized judicial inquiry into the motivations of the Government of France and could subject it to pretrial document and other discovery, which discovery in itself would be as much an affront to French sovereignty as would an adjudication by the court of the matters raised by TVA. Moreover, other governments have passed legislation protecting the confidentiality of matters pertaining to uranium marketing.

We are concerned that submission to jurisdiction may cause embarrassment to other nations and may affect French relations with those other nations. Indeed, one of the reasons this matter must if necessary be resolved

by the respective governments is that neither the French nor any other government, including the US, could properly permit disclosure of intimate facts relating to energy and other sensitive national policies connected with uranium. We are sure that your concerns in this regard are equal to ours.

We wish to inform the US Government of the facts relating to the origination of meetings among government representatives and uranium producers, and the relationship between URANEX and the Government of France. It is our hope that the United States State Department would present these facts to the court. Given the nature of the circumstances relating to uranium, as summarized below, it is our understanding that United States law would compel the court to refrain from exercising jurisdiction. Specifically, the principles supporting an abstention from jurisdiction are:

(1) The inability of the judiciary to resolve international disputes that bear on relations among nations, or would require judicial review of the validity or motivation of the actions of a foreign government acting within its sovereignty.,

(2) The principles of comity which require that nations refrain from unnecessarily intruding upon the interests of foreign sovereigns. and

(3) The fundamental unfairness of subjecting a defendant to antitrust liability under circumstances where a foreign government has encouraged, directed and otherwise participated in that defendant's activities. No matter which label is applied—"Act of State", "Sovereign Compulsion", "International Comity", or any other term —it is clear from all the circumstances that the legality of URANEX's participation in the meetings and agreements of government and producer representatives is non-justiciable by a United States court.

As far as the Government of France is concerned, the following facts relating to URANEX and the uranium market are incontrovertible and must lead to the conclusion that the exercise of jurisdiction by a United States court would be improper:

1—The Government of France regards uranium as vital to its national interest, with respect to energy and other sensitive national policies.

2—By ordinance dated October 18, 1945, the Government of France established the Commissariat à l'Energie Atomique ("CEA"), as an "établissement public à caractère scientifique technique et industriel" under the laws of France, and vested in the CEA full responsibility for the promotion, coordination and implementation of all aspects of French nuclear policy, including the assurance to French civil and other authorities that sufficient supplies of uranium will be available. The CEA was authorized to create, and has created, many subsidiary entities. On October 1, 1969, at the request and impetus of the CEA, URANEX was formed as a "Groupement d'intérét économique" (a non-profit juridicial entity authorized by ordinance dated September 23, 1967). URANEX was formed to market uranium exports in the form of concentrates, primarily from CEA stockpiles, in France and abroad.

3—The activities of URANEX alleged by TVA to violate United States antitrust laws were, in fact, carried out subject to the direction control and authorization of the CEA and other arms of the French Government.

4—French uranium stocks and reserves are an increasingly vital resource needed to serve French national interests. In addition, because France obtains uranium from mines in foreign countries, French uranium policies also impact on French policy towards these nations.

5—Effective December 23, 1966, the United States Atomic Energy Commission announced an embargo prohibiting the use in domestic United States reactors of foreign-source uranium to encourage the development of United States uranium production. This closed off the United States uranium production. This closed off the United States market for uranium, then estimated to be approximately seventy percent of the free world market, from all but domestic suppliers[.] The restrictions insulated United States producers of uranium from foreign competition and resulted in a deeper drop of worldwide uranium prices, as compared with US domestic prices.

6—In addition, in early 1972, the United States Atomic Energy Comission, then operating the only enrichment services in the free world, announced a change in its "tails assay" policy with respect to uranium enrichment services it offered. This so-called "split tails" policy, designed to help reduce US uranium stock-piles, artificially decreased the quantity of uranium to be supplied by customers, to replace it with uranium coming from US stockpiles. Thus, both foreign and domestic enrichment customers were compelled to purchase a portion of their uranium needs from US Atomic Energy Commission stockpiles. This further reduced the worldwide demand that could be satisfied by non-US producers.

7—The situation outside the United States soon reached crisis dimensions due to the distorsions of supply and demand that had occurred. All non-United States producers were competing for sales to only about thirty percent of the free-world market. France, and other nations developed substantial surpluses due to the severe drop in demand resulting from the American embargo.

8—Though recognizing that the United States policies had been adopted in furtherance of United States interests, it became apparent to French officials that some form of cooperation on a government-to-government basis was needed to mitigate the prevailing conditions which

threatened the survival of French and other uranium source. The French interest as well as the one of other producing and consumming [sic] countries was to continue production so that future needs could be satisfied.

9—After a serie [sic] of earlier informal contacts, in early February 1972, at the initiation of the French Government and an other government, government and producer representatives from France, and four other countries met in Paris and reached informal argeements relating to prices and markets designed to avoid the ruination to the non-US uranium mining industry. The meetings were not secretive. In fact, they were the subject of press releases, newspaper articles and, we understand, a communication to the United States Atomic Energy Commission by one of the other governments.

10—Representative of the same governments and producer groups met on several occasions between 1972 and 1975 to discuss actions which they thought necessary to preserve the viability of the uranium industry outside the United States, including the establishment of floor prices for sales of uranium outside the United States. In recognition of the sensibility of the United States Government relating to its own domestic market, the agreements reached at these meetings were intended expressly to exclude the United States from their scope. The participation of URANEX representatives, and other representatives of the French Government was at all times on behalf of French Government interests and policy and in furtherance of vital French national interests regarding uranium and nuclear energy.

11—We note that France is a net consumer of uranium and the French officials who represented both the CEA and URANEX at the meetings were responsible not only for production of uranium, but also for the supply of uranium to the French national electrical utility, Electricité de France. French Government, through the CEA,

had determined that it was in the French national interest to agree with other governments in order to impose a cooperation among producing companies to create and maintain a viable market outside the United States.

12—TVA's complaint against URANEX thus unavoidably seeks to hold unlawful under United States law the policies and actions of the French Government, acting in its sovereign capacity with regard to the sensitive political and economic issues raised by uranium and nuclear energy policy. Such an extra-territorial application of United States law, as outlined above, would constitute an unjustifiable invasion of French sovereignty.

Moreover, the issues raised by the TVA litigation involve extremely sensitive questions of relations among nations. All nations whose policies are called into question, including the United States, were acting pursuant to their own perceptions of national self-interest. If at any time these interests are thought to be inconsistent, the proper method for resolution is good faith government-to-government negotiation. The use of private party litigation to resolve such differences of opinion is inconsistent with all established notions of international relations.

APPENDIX P

I. OFFICIAL STATEMENTS THAT FOREIGN NATIONS HAVE EXERCISED PERVASIVE REGULATORY CONTROL OVER ALL ASPECTS OF THEIR URANIUM INDUSTRIES.

A. *Canada.*

1. Canada has had a comprehensive regulatory system for its uranium resource industry since the birth of the industry in the 1940's. It has exercised its sovereign prerogative to regulate virtually every aspect of this industry, ranging from exploration and mining to export sales, to ensure compliance with Government pricing policy.[1]

2. As a reflection of the importance Canada attaches to its uranium exports, the Government of Canada has, for many years, regulated the export of uranium, a vital national resource. These regulations have controlled the quantities, prices and other terms of export contracts for uranium. This governmental control was authorized by, and exercised under, the Atomic Energy Control Act and pertinent regulations. Strict export controls have been enforced under that Act throughout the period of time covered in the litigation pending before Judge Marshall, and these controls continue to this day.[2]

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[1] Memorandum of Government of Canada as *Amicus Curiae* filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 9.

[2] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (November 6, 1979), p. 2.

3. The long history of close Canadian Government involvement in and regulation of the uranium resource industry through stockpiling, export licenses and other measures clearly establishes the degree to which the Government regards the industry as vital to Canadian interests and the importance it consequently attaches to industry compliance with Government policy respecting uranium marketing.[3]

4. Canada regards its uranium resource industry as vital to its national interest. It has had a long history of close involvement in, and pervasive regulation of, this sector of its economy. The international uranium marketing arrangement was but one element of governmental policy concerning management of this resource.

. . .

From the onset Canada has exercised comprehensive and pervasive regulatory authority over the uranium industry, including exports.

. . .

While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate contracts on a transaction-by-

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[3] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), p. 2.

transaction basis after review by an inter-departmental panel. [Footnote omitted.] [4]

5. The basis of Canada's uranium policy is stated in the preamble to the Atomic Energy Control Act, namely that "it is essential in the national interest to make provision for the control and supervision of the development, application, and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon."

To protect the national interest in the different circumstances which now face us we will henceforth require that all contracts covering the export of uranium or thorium be examined and approved by the appropriate federal agency before any application for an export permit is considered. The examination will cover all aspects and implications of the contract such as nuclear safeguards, the relationship between contracting parties, reserves, rate of exploitation, domestic requirements, domestic processing facilities, and selling and pricing policy. Approval will not normally be given to contracts of more than ten years duration unless provision is made for renegotiation of price.[5]

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[4] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 16, 4, 7-8.

[5] Statement by the Hon. Otto E. Lang, Canadian Minister without Portfolio, in the House of Commons (June 19, 1969), p. 2.

6. The government has always controlled the export of uranium, under the Atomic Energy Control Act, and continues to do so.[6]

B. *South Africa.*

Since 1948, the mining, production, disposal, export and use of uranium in South Africa has been governed by the Atomic Energy Act No. 35 of 1948 and by the succeeding Atomic Energy Act No. 90 of 1967, and, under the provisions of these statutes, has been controlled by the South African Government acting through its Minister of Mines and the Atomic Energy Board established by these statutes.[7]

C. *Australia.*

1. Because of its importance to the Australian economy, the exportation of uranium from Australia has been the subject of control by the Australian Government since 1961 as part of the Government's overall policy and program for supervising important national resources. This control has been exercised through the Customs (Prohibited Exports) Regulations made under the Customs Act of 1901.[8]

2. [T]he Australian Government has been deeply involved in the control and regula-

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[6] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 3.

[7] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 4-5.

[8] Brief of the Government of Australia as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (September 27, 1979), p. 3.

tion of the uranium industry in Australia for many years and has a continuing interest in the viability of that important aspect of the Australian economy.[9]

D. *France.*

The Government of France regards uranium as vital to its national interest, with respect to energy and other sensitive national policies. . . . By ordinance dated October 18, 1945, the Government of France established the Commissariat a l'Energie Atomique ("CEA") . . . under the laws of France, and vested in the CEA full responsibility for the promotion, coordination and implementation of all aspects of French nuclear policy, including the assurance to French civil and other authorities that sufficient supplies of uranium will be available.[10]

II. OFFICIAL STATEMENTS THAT FOREIGN URANIUM INDUSTRIES WERE DEVELOPED PRINCIPALLY TO SATISFY U.S. DEMAND BUT WERE THEN DEVASTATED BY PROTECTIONIST POLICIES ADOPTED BY THE U.S. GOVERNMENT, AND THAT THE FOREIGN CARTEL WAS FORMED TO MITIGATE THE DEVASTATING IMPACT OF THE AMERICAN GOVERNMENT'S ACTIONS

A. *Canada.*

1. Canada's uranium resource industry expanded vigorously through the 1950's,

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[9] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 2.

[10] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 3.

largely to meet United States demands. In the 1960's, the United States government took actions aimed at protecting its domestic uranium producers, and effectively closed the large United States market to Canadian and other foreign uranium producers. These American actions threatened the survival of the entire Canadian uranium industry, thereby imperilling Canada's national security and vital economic interests.

In an effort to minimize the disruptive effects threatened by United States policies, the Canadian government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangement.[11]

2. The [uranium] industry was vigorously promoted, largely in response to United States' needs, and became a substantial factor in Canada's overall resource development program. By 1959, uranium was Canada's fourth largest export by value and employed 13,600 people. The industry then entered a period of disruption and decline because of United States' actions in limiting, then closing, its domestic market to Canadian product.

. . .

This policy element [the international marketing arrangement] was employed by the Government during a limited time

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[11] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 2-3.

period (1972-1975) when certain U.S. government policies threatened the survival of the entire Canadian uranium resource industry, thereby imperilling Canada's vital interests. The purpose of the international marketing arrangement was to minimize the disruptive effects threatened by American policies by allocating the meager non-U.S. demand among the non-U.S. producers, and by stabilizing prices for a transitional period.[12]

3. The international uranium marketing arrangement was established in response to U.S. protectionist policies that threatened the survival of the Canadian uranium industry; and Canada advised the United States Government that the arrangement had been initiated.[13]

4. [T]he policy [the international marketing arrangement] was adopted following action by the United States Government which effectively closed the large U.S. market to Canadian and other foreign uranium producers, with severe adverse consequences for the Canadian uranium mining industry.[14]

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[12] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 4-5, 16-17.

[13] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 23.

[14] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), p. 2.

5. This policy [the international marketing arrangement] was defensible in 1972 and it is no less defensible today. We were influenced in this decision by the following considerations: 1) The decision was a direct response to U.S. actions that effectively closed the U.S. market for uranium to Canadian producers.

. . .

In short, the marketing arrangement authorized by the government was temporary. It was defensive in nature and directed at protecting the Canadian industry and Canadian communities against restrictive actions by the U.S.[15]

6. The decision to support such a marketing arrangement was based on the need to preserve the Canadian mining industry and its dependent communities during a period of over-supply and consequent low prices. It was also apparent that a viable Canadian and international industry would be essential to meet a near-term resurgence of world demand for uranium.

The depressed markets resulted in large measure from the policies of the United States Government which had closed the large U.S. market to foreign uranium. At the same time U.S. corporations were competing aggressively for sales contracts outside of their protected domestic market, and uranium from the U.S. Government

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[15] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 2, 5.

stockpile was also being moved into the international market by means of conditions imposed on foreign users of U.S. uranium enrichment facilities.

In an effort to survive under these conditions the Canadian Government and the producing industry agreed to a series of minimum exports prices and a means of sharing the available market.

. . .

It is still our opinion that Canadian participation in the arrangement was necessary and appropriate in all of the circumstances; circumstances which resulted largely from United States policies which interfered with normal market forces.[16]

B. *France.*

The situation outside the United States soon reached crisis dimensions due to the distortions of supply and demand that had occurred. All non-United States producers were competing for sales to only about thirty percent of the free-world market. France, and other nations developed substantial surpluses due to the severe drop in demand resulting from the American embargo.

Though recognizing that the United States policies had been adopted in furtherance of United States interests, it became apparent to French officials that

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[16] Statement by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources (June 14, 1977), pp. 1, 3.

some form of cooperation on a government-to-government basis was needed to mitigate the prevailing conditions which threatened the survival of French and other uranium source. The French interest as well as the one of other producing and consuming countries was to continue production so that future needs could be satisfied.[17]

C. *Australia.*

From submittals made in this proceeding by the Governments of Canada, France, and South Africa, as well as from the instant brief and other statements made on behalf of the Government of Australia, it is evident that the challenged arrangements were fostered and approved on an international basis by the governments concerned, although excluding the United States market, as a necessary response to an embargo imposed by the United States Government prohibiting the importation into the United States of foreign uranium for domestic use. [Footnote omitted.[18]]

D. *United Kingdom.*

Despite the protests of foreign governments, this total ban on the use of foreign uranium in U.S. domestic reactors continued until 1977 and is only now in the

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[17] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 4.

[18] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 10.

process of being phased out under regulations adopted in 1974. Because the U.S. market represented at the time some three quarters of the world market, other U.S. policies relating to uranium supply, including the AEC's "tails assay" approach, also worked to depress significantly the prospects for foreign uranium producers. Meanwhile, U.S. companies, benefiting from this protection in their home markets, continued to sell uranium outside the United States in competition with foreign uranium producers.

These circumstances caused great concern and a reaction from the major producing nations, all of which closely controlled the conditions, including the price, on which uranium was exported.[19]

III. OFFICIAL STATEMENTS THAT FOREIGN GOVERNMENTS INITIATED, PARTICIPATED IN AND RAN THE FOREIGN CARTEL, AND SECURED COMPLIANCE AND PARTICIPATION BY THE FOREIGN URANIUM PRODUCERS IN THE CARTEL.

A. *Canada.*

1. The Canadian Government directed its Government-owned corporations to participate in the meetings of the international marketing arrangement which discussed and arrived at proposed prices and quantities and other terms for export sales. The Government also secured the partici-

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[19] *Amicus Curiae* Brief of Government of United Kingdom, filed in U.S. District Court, N.D. Illinois (August 3, 1979), pp. 4-5.

pation of all Canadian uranium producers. This was essentially done by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest. Given the range of existing tools at its disposal to ensure compliance of Canadian companies with its policies, including denial of export permits, it was not necessary for the Canadian Government to seek new legislation specifically requiring companies to participate in the uranium marketing arrangements. [Footnotes omitted.]

. . .

The officials of the Canadian Crown corporations, Uranium Canada Limited and Eldorado Nuclear Limited, were acting as agents of the Government. The Uranium Canada officials were also officials of the Ministry of Energy, Mines and Resources and reported directly to the Government through their Ministry.[20]

2. The long history of close Canadian Government involvement in and regulation of the uranium resource industry clearly establishes the degree to which the Government regarded the industry as vital to Canadian interests and the importance it consequently attached to industry compliance with Government policy respecting

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[20] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 6-7.

uranium marketing. For these reasons, the Canadian Government, acting in cooperation with governments of other producing countries, initiated and later participated in an international uranium marketing arrangement. The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the national interest.

. . .

Until the marketing arrangements were discontinued in 1975, the Canadian Government through government-owned corporations was an active participant in meetings and decisions of the marketing group. Officials of the Ministry of Energy, Mines and Resources, acting through these corporations, took an active role in all phases of the arrangement and attended meetings of producers from the various countries and of Canadian producers.

. . .

During the 1972-75 period, the participation of all Canadian uranium producers in the international marketing arrangement was a matter of firm Government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and regulations promulgated thereunder. This policy, which was clearly expressed in the public statements of Canadian officials, was defensive in nature and was considered to be in the vital national interest of Canada.

. . .

In addition, Canadian Government officials made every effort to secure and did secure the participation of all Canadian uranium producers.

. . .

It would be improper to enter a finding, for example, . . . that the Canadian Government "made clear at all relevant times prior to 1976 that it was the producers, and not the governments, which ran the cartel", contrary to fact and to the Canadian Government's official statements, which are to be given deference. [Footnote omitted.][21]

3. [T]he participation of all Canadian uranium producers in certain uranium marketing arrangements was a matter of Canadian government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and Regulations.

. . .

The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the Canadian national interest in the light of projections of future uranium requirements.[22]

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[21] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 14, 15, 16, 36.

[22] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 2.

4. The marketing arrangement was implemented in Canada in part through general Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities for export sales to end-users in countries other than the participating countries and the United States. Prices and terms for other export sales covered by the arrangement, such as sales to manufacturers for resale and use in countries other than the participating countries or the United States, were regulated by the Atomic Energy Control Board on a transaction-by-transaction basis.[23]

5. In an effort to minimize the disruptive effects threatened by United States policies, the Canadian government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangements.

. . .

During 1972-75, however, the participation of all Canadian uranium producers in this marketing arrangement was a matter of firm Canadian government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and Regulations. This policy, which was defensive in nature and temporary in application, was considered to

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[23] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 6.

be in the vital national interest of Canada.[24]

6. The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production.[25]

7. I have the honour to inform you that the policy of the Canadian Government was to support and participate in international uranium marketing arrangements from 1972 to 1975 to ensure the survival of the Canadian uranium industry which was being damaged by the restrictive uranium trade practices of the United States. Canadian Ministers and officials were acting within their authority in this matter and acted in the way they did to protect Canadian national interests. The Cana-

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[24] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 3, 4.

[25] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 1-2.

dian Government finds it objectionable that this Canadian Government policy should be questioned under United States law.

I have the further honour to inform you that the participation of all Canadian uranium producers in these uranium marketing arrangements was a matter of Canadian Government policy to ensure the survival of the industry and, accordingly, to protect the Canadian national interest. Canadian Government policy in this regard was implemented through the Atomic Energy Control Act and Regulations. These Regulations provide, *inter alia*, that no person shall produce, mine, prospect for, refine, use, sell, export, import or possess for any purpose natural uranium, except in accordance with a license issued by the Atomic Energy Control Board.[26]

8. [I]t is clear that the Government's establishment of and participation in the marketing arrangement was based on its view that the arrangement was essential to Canada's national interests.[27]

9. Because it was the government's opinion that the arrangement was in the national interest, it passed a Regulation in July 1972 under S.9 of the Atomic Energy Control Act authorizing the AECB, in con-

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[26] Diplomatic Note No. FLP-177 from Canadian Acting Secretary of State for External Affairs to U.S. Ambassador (August 15, 1977), pp. 1-2.

[27] Memorandum of Government of Canada as *Amicus Curiae* filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 16.

sidering export contracts for uranium, to ensure that prices and quantities as specified in Direction to the board by the Minister of Energy, Mines and Resources pursuant to S.7 of that Act, were followed.[28]

B. *Australia.*

1. The marketing arrangements in question formed part of a fundamentally important Australian Government policy for the control of production and export of Australian uranium.[29]

2. The United States Government did not alter its announced policies and, in these circumstances, it was the policy of the Australian Government that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, with respect to the stabilization of prices in the world market which, as a result of the United States government decision, excluded the United States market.[30]

3. On 27 June 1972 the then Minister for National Development specifically endorsed in writing the principles relating to the export of uranium from Australia as negotiated by the uranium industry at the Johannesburg meeting. The Minister's ap-

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[28] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 6.

[29] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 8.

[30] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 7.

proval was conveyed on the following day to the Australian uranium producers.[31]

4. It will be apparent from the foregoing information that the arrangements which were made by Australian uranium producers for the marketing of Australian uranium were made with the approval of the Australian Government. Since 1961 every contract providing for the export of uranium from Australia has needed the approval of the Australian Government. It will be apparent also that the arrangements have formed part of a fundamentally important Australian governmental policy for the control of all aspects of the uranium industry. That policy has been formally administered through an Australian law, namely, the Customs Act of 1901.[32]

5. Pursuant to the Government's policy of controlling all significant aspects relating to the export of Australian uranium, on 28 September 1972 the then Minister for National Development made a further statement to the Australian Parliament . . . in the course of which he referred to the part which the Australian Government had taken in discussions with the Governments of Canada and France, and in which he referred to the meetings that had been held in Paris and Johannesburg between companies of the major

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[31] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 6.

[32] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 7.

uranium producing countries in the western world outside the United States.[33]

C. *France.*

As is summarized below, at all time URANEX's participation in meetings of uranium producers was under instructions from appropriate French authorities. To attack URANEX's conduct is in fact to attack the conduct of the Government of France.

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As far as the Government of France is concerned, the following facts relating to URANEX and the uranium market are incontrovertible and must lead to the conclusion that the exercise of jurisdiction by a United States court would be improper . . . 3—The activities of URANEX alleged by TVA to violate United States antitrust laws were, in fact, carried out subject to the direction, control and authorization of the CEA and other arms of the French Government.

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After a series of earlier informal contracts, in early February 1972, at the initiation of the French Government and another government, government and producer representatives from France, and four other countries met in Paris and reached informal agreements relating to prices and markets designed to avoid the

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[33] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 4.

ruination to the non-US uranium mining industry.

. . .

Representatives of the same governments and producer groups met on several occasions between 1972 and 1975 to discuss actions which they thought necessary to preserve the viability of the uranium industry outside the United States, including the establishment of floor prices for sales of uranium outside the United States . . . The participation of URANEX representatives, and other representatives of the French Government was at all times on behalf of the French Government interests and policy and in furtherance of vital French national interests regarding uranium and nuclear energy.[34]

D. *South Africa.*

Early in 1972 the South African Government approved the participation of representatives of South African uranium producers in meetings with other world uranium producers, excluding producers in the United States, the purpose of which was to review the implications of market conditions then prevailing for such producers and the nuclear power industry.

Subsequent to the 1972 meetings certain criteria designed to regulate production, prices and terms for export of uranium, based on the outcome of the 1972 discussions, were approved by the South Afri-

[34] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 1, 3, 4-5.

can Government and applied by the President of the Atomic Energy Board under authority delegated to him by the Government in terms of the 1967 Act. Under the Atomic Energy Act, in order to obtain the authority to sell South African uranium, producers were legally obliged to observe these criteria.

The adoption of these criteria by the South African Government was deemed by it to be in the national interest in order to stabilize the market and the non-U.S. uranium industry.[35]

IV. OFFICIAL STATEMENTS THAT THE FOREIGN CARTEL SPECIFICALLY EXCLUDED THE U.S. MARKET FROM THE TERMS OF THE ARRANGEMENT, BUT THAT FOREIGN GOVERNMENTS NONETHELESS REGULATED THE TERMS OF ALL EXPORT SALES, INCLUDING THOSE TO THE U.S.A.

A. *Canada.*

1. The arrangement did not apply to sales to consumers in participating countries and in the United States. [Footnote omitted.][36]

2. The marketing arrangement was implemented in Canada in part through General Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities

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[35] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 7-8.

[36] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 15.

for export sales to end-users in countries other than the participating countries and the United States.[37]

3. No significant impact on the U.S. market could have been anticipated in 1972, since the United States Government had imposed an embargo on foreign uranium and at that time there was no prospect of its removal. Any potential effect on the United states was further minimized or excluded by providing that the arrangement did not extend to sales to the United States. (This was an accommodation to the U.S. interests, consonant with the approach of comity.)

. . .

Canada's use of the international marketing arrangement was intended to be and was only temporary, and during its short life the arrangement did not apply to sales to end-users in the United States.[38]

4. Canadian laws and policies which have been described in official statements clearly applied to transactions by Canadian uranium producing companies with parties such as the plaintiffs in these cases during the period in question. The prices and terms of all uranium export sales from Canada (including those to the U.S.A.) have been reviewed and regulated by the Canadian Government. For example, sales

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[37] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 6.

[38] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 20, 23.

to TVA were subject to Government review and control; indeed, this Court has previously been provided with evidence of the Government's rejection of a proposed sale contract with TVA. All export contracts were reviewed to assure conformity with the Government policies, including obtaining the optimum return for Canada's uranium resources. [Footnotes omitted.] [39]

5. The Canadian Government's control of commercial terms under which uranium is exported applies to all exports, including those for end use in the United States. Prior to 1975, essentially all deliveries of uranium for end use in the United States were sold to the United States Atomic Energy Commission under contracts negotiated during the 1950's; however in the mid-1970's certain Canadian producers concluded contracts directly with U.S. customers. The terms and conditions of these contracts, including prices and volumes, were subject to review and approval by the regulating agencies.[40]

6. I am releasing today, the seven general Directions dealing with prices and quotas that were issued between 1972 and 1975 by the Minister to the AECB. In considering these Directions, the following points are particularly relevant: 1) All the Di-

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[39] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 8.

[40] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 8-9.

rections make it explicit that the Canadian and U.S. markets were to be excluded from the agreed marketing arrangements. However, the government continued through this period, as it does now, to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports were and are in the public interest.[41]

7. Beginning in 1969 the Government used its regulatory authority to establish and carry out a system for review of all aspects of export contracts, including pricing policy and sales terms. Since 1972, Ministerial directions under the Atomic Energy Control Act dealing with price, quantity and other terms have been issued to the Atomic Energy Control Board, which reviews and regulates all uranium export contracts. [Footnotes omitted.] [42]

8. While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate contracts on a transaction-by transaction basis after review by an interdepartmental panel.[43]

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[41] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 5.

[42] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 5.

[43] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 7-8.

B. *Australia.*

> [T]he policy of the Australian Government was that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, with respect to the stabilization of prices in the world market which, as a result of the United States Government decision, excluded the United States market.[44]

C. *France.*

> [T]he agreements reached at these meetings were intended expressly to exclude the United States from their scope.[45]

V. OFFICIAL STATEMENTS THAT VARIOUS FOREIGN STATUTES AND REGULATIONS PROHIBITING PRODUCTION OF DOCUMENTS AND TESTIMONIAL EVIDENCE WERE ENACTED TO PROTECT THE VITAL NATIONAL INTERESTS OF FOREIGN GOVERNMENTS AND ARE PART OF THEIR REGULATORY POLICIES CONCERNING THEIR URANIUM INDUSTRIES.

A. *Canada.*

1. The Regulations were enacted to serve a vital national interest—the preservation of Canada's past and future sovereign authority to secure compliance with its own

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[44] Brief of the Government of Australia as *Amicus Curiae*, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 3-4.

[45] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 4.

laws and policies respecting a vital Canadian natural resource. The Government's authority would be undermined if the multinational corporations that play a major role in the Canadian industrial and resource sectors were to be more responsive in their Canadian activities to U.S. laws than to Canadian law and policy. The Regulations cannot be considered apart from the history of direct government participation in the marketing arrangement and the Canadian Government's role as industry regulator over the past 30 years. As we have previously stated, the Regulations were not procured by members of the uranium industry and were not adopted to protect the commercial interests of those companies. They were enacted to carry out matters of government interest and policy. [Footnote omitted.] [46]

2. [W]hen it became clear that documents located in Canada bearing on the international uranium marketing arrangement might be removed to the United States in response to proceedings there, the Canadian government promulgated the Uranium Information Security Regulations, on September 23, 1976. The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies

[46] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 17-18.

respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies. [Footnote omitted.] [47]

3. [T]he Canadian material called for by the U.S. subpoenas contains information in respect of activities approved and supported by the Canadian government. Clearly this must be regarded as an issue of sovereignty. The government has therefore moved to prevent the removal of such documents from Canada.[48]

4. The *Uranium Information Security Regulations* are a separate issue. In essence, they awere designed to protect the sovereignty of Canada in the face of extraterritorial application of U.S. legal processes.[49]

5. Canada's unwavering insistence that the Regulations be enforced reflects the governmental policy decision that disclosure of documents and information covered by the Regulations would be inimical to the

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[47] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 4-5.

[48] Statement by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources (September 22, 1976), p. 2.

[49] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 7.

national interest of Canada. [Footnote omitted.] [60]

6. It has been the continuing and oft-stated policy of the Canadian government since September 23, 1976 to enforce these Regulations. Substantial criminal penalties are provided for violation of the Regulations.[61]

7. The *Uranium Information Security Regulations* are expressive of a vital Canadian national interest. The importance that the Canadian Government attaches to enforcement of these Regulations has been underscored by its protests to the exercise of enforcement jurisdiction. [Footnotes omitted.] [62]

B. *Australia.*

Moreover, as is explained in the attached letters for not granting consent, the orders issued pursuant to the statute were made because the then Attorney-General was satisfied that the restrictions provided in them were desirable for the purpose of protecting the Australian national interest.[63]

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[60] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 7.

[61] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Supreme Court (April 17, 1978), p. 3.

[62] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Supreme Court (April 17, 1978), p. 10.

[63] Letter from Australian Ambassador to U.S. District Court, N.D. Illinois (May 25, 1979), p. 3.

C. *France.*

> [T]he Government of France is concerned that submission to jurisdiction by URANEX would result in an unauthorized judicial inquiry into the motivations of the Government of France and could subject it to pretrial document and other discovery, which discovery in itself would be as much an affront to French sovereignty as would an adjudication by the court of the matters raised by TVA.[54]

D. *South Africa.*

> [T]he South African Atomic Energy Board, acting in terms of the powers conferred upon it by the South African Atomic Energy Act 1967, was not prepared to authorize the production of documents or disclosure of information in South Africa connected with the discussions or meetings which took place between uranium producers in the period 1972 to 1975 (whether in or outside South Africa) concerning the export of uranium or the prices or terms on which uranium was sold or exported.[55]

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[54] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 2.

[55] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 10-11.

VI. OFFICIAL STATEMENTS OBJECTING TO THE EXTRATERRITORIAL APPLICATION OF U.S. LAW TO THE ACTIVITIES OF THE FOREIGN CARTEL AND TO THE IMPOSITION OF SANCTIONS BECAUSE A PARTY IS PRECLUDED BY FOREIGN LAW AND POLICY FROM PRODUCING DOCUMENTS AND INFORMATION LOCATED ABROAD.

A. *Canada.*

1. Since activities pursuant to the uranium marketing arrangement constituted an essential element of Canadian national policy concerning resource management, a decision by this Court to exercise jurisdiction over these activities would constitute a direct threat to Canadian law and policy. Inquiry into the propriety or legality of these activities would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs. Beyond this, if the Court were to proceed to grant relief that punished defendants for actions taken in pursuance of Canadian national policy, there would be a direct and unacceptable conflict with Canadian law and policy. Canada would regard it as a serious breach of international comity if there were either an assessment of damages based upon such activities or an injunction which impeded Canada's future sovereign right to control its own economy.

. . .

The exercise of antitrust jurisdiction in this case is a subject of great concern to the Government of Canada. In its view, it is objectionable that actions of the Ca-

nadian uranium industry, taken outside the United States in accordance with Canadian law and in response to declared national policy, should give rise to civil or criminal liability in the United States. The Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined.[66]

2. Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of Canadian government policy.[67]

3. The government finds it objectionable that the actions of Canadian uranium producers, which were required by Canadian law and taken pursuant to Canadian policy, should be called into question by foreign courts.

. . .

These limited restrictions continue to be necessary to ensure that Canadian sovereignty is adequately protected from the extraterritorial application of U.S. legal

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[66] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 19-20, 1-2.

[67] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 4.

processes. Other countries, such as Australia, have enacted legislation designed to deal with threats of interference with their sovereignty by foreign legal processes and the Canadian government may at some point have to consider introducing such legislation.[58]

4. Participation in the uranium marketing arrangement constituted an essential element of Canadian policy. In these circumstances, Canada considers it contrary to her sovereign prerogatives for a U.S. Court to question the propriety or legality of the activities of Canadian uranium producers that were undertaken outside the United States and in compliance with or in implementation of Canadian Government laws and policies.

. . .

The depth of Canada's concern relating to American efforts to inquire into Canadian policy has flowed from basic notions of sovereignty and fundamental considerations of national interest. This concern has been expressed in a substantial number of diplomatic notes and other formal expressions which have evidenced the deleterious consequences of the exercise of antitrust jurisdiction over this subject matter.[59]

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[58] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 8, 10.

[59] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 16, 22.

5. In respect of these proceedings, the position of the Canadian Government as expressed in the public statements of The Honourable Alastair Gillespie, the Minister of Energy, Mines and Resources, and in Diplomatic Notes presented to the Department of State has consistently been that it would be contrary to the national interest of Canada for the propriety or legality of actions of Canadian uranium producers taken outside the United States and which were required by Canadian law or taken in implementation of Canadian Government policy to be called into question before United States courts and tribunals.[60]

6. Under established principles of international comity recognized by U.S. law, the official pronouncements of a foreign government describing its own activities must be given conclusive effect by United States courts. In the present situation, where the Canadian Government has described to this Court laws, policies, and actions concerning marketing of Canadian uranium, this Court should accept Canada's statement as the basis for its consideration.[61]

7. A situation in which courts of the United States imposed sanctions for failure to produce documents or information located in Canada where such production

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[60] Diplomatic Note No. 116 from Canadian Embassy to U.S. Department of State (March 15, 1978), pp. 2-3.

[61] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 24.

would violate Canadian laws and regulations would be a matter of serious concern to the Government of Canada because it would subordinate to the procedures of U.S. courts the authority of the Government of Canada to prohibit the disclosure of certain information in Canada relating to the production and marketing of Canadian uranium.

. . .

The Government of Canada has expressed on a number of occasions its serious concern that acts relating to the Canadian uranium industry, done outside the United States in accordance with Canadian law and in response to the declared national policy of the Canadian Government, should give rise to civil or criminal liability in the United States. One manifestation of this serious concern is the Uranium Information Security Regulations. These Regulations were approved by the Canadian Government to prevent documents and information in Canada from being produced for use in legal proceedings outside Canada where those proceedings seek to attach civil or cirminal liability for acts done outside the national territory of the courts concerned in accordance with Canadian law and in response to declared Canadian policies. The Regulations themselves, therefore, were put in place to serve a vital Canadian national interest, preservation of the Canadian Government's liability to secure compliance with its own laws and policies respecting a vital Canadian natural re-

source in the face of assertions of jurisdiction by non-Canadian tribunals.

A number of parties to various civil actions before United States courts have made urgent and vigorous requests to the Canadian Government for a waiver from the Regulations, amendment to the Regulations or any other action on the part of the Canadian Government which would enable them to comply with the orders of the U.S. courts. The Government has refused each of these requests and has continued to prevent production of the documents and information in question because it considers disclosure of documents to which the Uranium Information Security Regulations apply to be inimical to the national interest of Canada. The Canadian Government has also declined to release certain documents and information for the same reason when requested to do so by the Government of the United States for use in proceedings before a U.S. Grand Jury.

The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose information located in Canada where such production or disclosure would require a person or corporation in Canada to perform an act or omission in Canada which is prohibited by the Uranium Information Security Regulations or any other law of Canada. The threat or imposition of any

such sanction would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian Government.[62]

8. The Canadian Government would be deeply concerned if the courts of the United States were to seek to induce behavior in Canada contravening Canadian law. Such action by United States courts would be inconsistent with international comity.[63]

9. The Canadian government has, on a number of occasions, expressed the seriousness with which it regards efforts of U.S. litigants to obtain United States court orders that would induce behavior in Canada violative of the Regulations.[64]

10. [I]t would not be proper to take adverse action against any party because of the failure to produce documents or information when its failure is due to the fact that production is prohib-

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[62] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 2 and 3.

[63] Diplomatic Note No. 116 from Canadian Embassy to U.S. Department of State, March 15, 1978, p. 1.

[64] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 7.

ited by the law of a friendly foreign country, such as Canada.

. . .

Principles of international comity preclude adverse action against any party because such party's compliance with the prohibition of Canadian law and the consequent inability to produce documents and information in this litigation.[65]

11. The Canadian Government is deeply concerned that an order has been issued by a United States court, the effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result that would be inconsistent with international comity.[66]

B. *Australia.*

1. In view of the serious effect that recovery under the judgment in these proceedings could have upon the Australian national interest, the Australian Government felt bound to take such action as was avialable to it to ensure that the judgment would not be enforceable in Australia.[67]

2. The Court's attention is particularly invited to the attached Second Reading

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[65] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 2, 23.

[66] Diplomatic Note No. 620 from Canadian Embassy to U.S. Department of State (December 9, 1977), p. 2.

[67] Brief of the Government of Australia as *Amicus Curiae* filed in U.S. Court of Appeals for the 7th Circuit (September 27, 1978), p. 4.

speech of the then Attorney-General, in which he stated, with particular reference to the above-mentioned and other uranium litigation that 'claims are being made that the United States anti-trust laws have an operation outside the United States to an extent which is beyond what is generally conceded in international law and beyond what other countries are presently prepared to concede in relation to the pending proceedings.'[68]

3. Australia has become increasingly concerned at the extent to which United States antitrust laws are being applied to conduct outside the United States by Australian companies or Australian citizens acting consistently with Australian law or policy.

United States antitrust laws are applied to the foreign commerce of the United States. What has to be remembered is that the foreign commerce of the United States is also the foreign commerce of another country or countries. That is the nature of international commerce. The United States is, as we see it, seeking to impose its national laws in ways which create conflict with the laws or policies of other countries.

Every country, of course, has the right to seek to protect its own interests and the interests of its citizens and corporations. But when that protection is sought

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[68] Letter from Australian Ambassador to U.S. District Court, N.D. Illinois (May 25, 1979), pp. 2-3.

to be extended in ways that seriously interfere with and compromise the conduct of trade and commerce between nations, and that raise the risk of creating difficulties in international relations, then we need to think very carefully about what we are doing.

Nobody should be left in any doubt as to the seriousness with which we view the current private treble damages suit under your antitrust laws which has been instituted by Westinghouse Electric Corporation against a number of United States and foreign companies. Four major Australian companies are involved. Australian companies are already being disadvantaged and their ability to trade and conduct their affairs normally is being affected in a wide range of mineral commodities. This is certainly not in our interests nor, would I have thought, in yours.[69]

C. *France.*

TVA's complaint against URANEX thus unavoidably seeks to hold unlawful under United States law the policies and actions of the French Government, acting in its sovereign capacity with regard to the sensitive political and economic issues raised by uranium and nuclear energy policy. Such an extra-territorial application of United States law, as outlined above,

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[69] Address by the Rt. Hon. J. D. Anthony, M.P., Australian Deputy Prime Minister (December 12, 1979), pp. 7-8.

would constitute an unjustifiable invasion of French sovereignty.

. . .

It is the view of the Government of France that this litigation represents an attempt to impose a judicial solution upon matters which if considered by the U.S. Government as being issues, would be proper for resolution only on a government-to-government basis. We informed the United States of the governmental nature of these problems in our communique of March 1978 in connection with the then ongoing grand jury relating to uranium.

. . .

We reiterate the suggestion by the Government of France that, if discussions on matters pertaining to, an alleged uranium marketing organization are considered necessary they should take place directly with the US Government and the governments of other nations.[70]

D. *South Africa.*

Having regard to the conflict of national and international laws and of legal opinion, the South African Government considers there is no legal ground or justification for the extraterritorial application of U.S. antitrust laws to South African companies whose association and activities with other uranium producers directed at stabilizing the industry outside

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[70] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 5, 1.

the U.S. was not only lawful in terms of South African law but considered by the South African Government in its national interest.[71]

E. *United Kingdom.*

1. This proceeding invokes the extraterritorial application of U.S. antitrust law, which the British Government regards as penal, to activities carried on outside the United States by citizens of the United Kingdom who are not present in the United States. The British Government has consistently maintained that such assertions of jurisdiction are inconsistent with international law and unfairly subject British enterprises to the sharply conflicting demands and policies of different sovereign governments. Furthermore, because of the international ramifications of the disputes posed in this litigation, significant decisions made in its course are likely to have serious effects on international trade and investment well beyond the confines of the uranium industry. Moreover, uranium is itself of major importance to the British Government for energy and national defense purposes.[72]

2. Finally, and most important, the U.S. courts claim subject matter jurisdiction

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[71] Memorandum of Government of South Africa as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (August 16, 1979), p. 11.

[72] Brief of the Government of the United Kingdom, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 3-4.

over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.[73]

3. I am speaking here, as I have already explained, as a member of a government which is determined to restore the primacy of competition and enterprise in the economy of the United Kingdom. But what is discouraged or illegal in one country may be legal or positively encouraged in another. And the so-called quote effect unquote doctrine of US law is leading to many instances where United States authorities are seeking to exercise their regulatory or investigatory powers over individuals or companies situated and operating outside the United States in ways which appear thoroughly objectionable in the countries concerned. Take, for example, the current anti-trust case alleging a cartel of non-U.S. uranium producers.[74]

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[73] Diplomatic Note No. 225 from British Embassy to U.S. Department of State (November 27, 1979), p. 4.

[74] Address by the Rt. Hon. John Nott, M.P., British Secretary of State for Trade (September 14, 1979), p. 7.

VII. OFFICIAL STATEMENTS THAT THE EXERCISE JURISDICTION BY U.S. COURTS WITH REGARD TO THE FOREIGN CARTEL AND IN DISREGARD OF FOREIGN PROHIBITIONS AGAINST PRODUCTION OF DOCUMENTS HAVE ALREADY HAD ADVERSE EFFECTS ON INTERNATIONAL RELATIONS AND WOULD HAVE SUCH FURTHER EFFECTS.

A. *Canada.*

1. It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian American relations. This situation is considered undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction.[75]

2. A massive judgment against a Canadian company in the circumstances of this case would have adverse implications for relations between Canada and the United States.[76]

3. Such a failure on the part of courts in the United States to recognize the authority of the Canadian Government to prohibit such disclosure would be contrary

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[75] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 23.

[76] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (November 6, 1979), p. 6.

to generally accepted principles of international law and would have an adverse impact on relations between the USA and Canada.

. . .

Such procedure would be inconsistent with generally accepted principles of international law, with the manner in which the Governments of Canada and the United States carry on their mutual relations and with the spirit of those relations.[77]

4. The Canadian and American governments have been engaged in consultations exploring cooperation in enforcement of the countries' respective antitrust laws and avoidance of potential conflicts between the applications of the United States antitrust laws and Canadian sovereign interests. These consultations are in advanced stage, and a judicial decision insensitive to Canadian sovereignty could adversely affect this process.[78]

B. *Australia.*

The Australian Government is concerned that the effect of a judgment for damages against the Australian defendants and the continuing enforcement of that judgment may constitute a serious

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[77] Diplomatic Note ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 2.

[78] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 14.

irritant of indefinite duration in bilateral relations between Australia and the United States of America.[79]

C. *France*

We are concerned that submission to jurisdiction may cause embarrassment to other nations and may affect French relations with those other nations. Indeed, one of the reasons this matter must if necessary be resolved by the respective governments is that neither the French nor any other government, including the U.S., could properly permit disclosure of intimate facts relating to energy and other sensitive national policies connected with uranium. We are sure that your concerns in this regard are equal to ours.

. . .

Moreover, the issues raised by the TVA litigation involve extremely sensitive questions of relations among nations. All nations whose policies are called into question, including the United States, were acting pursuant to their own perceptions of national self-interest. If at any time these interests are thought to be inconsistent, the proper method for resolution is good faith government-to-government negotiation. The use of private party litigation to resolve such differences of opin-

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[79] Brief of the Government of Australia as *Amicus Curiae*, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 8.

ion is inconsistent with all established notions of international relations.[80]

C. *South Africa*

1. The South African Government respectfully suggests, furthermore, that such extraterritorial application to non-U.S. uranium producers, acting lawfully in terms of their own national laws and international law, would constitute a challenge to the sovereignty of nations and could disturb friendly relations with the United States. In the view of the South African Government, the legal and economic implications of such application would extend beyond the business activities and financial position of the South African companies concerned and the uranium industry with which they are associated.[81]

2. The interest of the South African Government in this litigation arises from the attempted application of United States antitrust laws to activities carried on outside the United States by South African companies acting in compliance with South African law and South African Government policy. It also arises from the fact that decisions made in the course of this litigation are likely to have serious effects on international trade and commerce ex-

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[80] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 2, 5.

[81] Memorandum of Government of South Africa as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (August 16, 1979), pp. 11-12.

tending beyond the confines of the uranium industry and could well impair friendly relations between South Africa and the United States.[82]

D. *United Kingdom*

[I] . . . want to take this chance to highlighting a few cases in which good relations between our countries are being impaired by the extent to which the laws of the United States, whether as a result of the intentions of Congress or the interpretation of the courts, are applied in practice beyond your own frontiers. This is not a new problem: it has been a matter for contention with some of your overseas partners and friends for decades. Preeminently this happens in the complex field of anti-trust law.[83]

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[82] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 4.

[83] Address by the Rt. Hon. John Nott, M.P., British Secretary of State for Trade (September 14, 1979), pp. 6-7.

APPENDIX Q

THE LEGAL ADVISER
DEPARTMENT OF STATE
Washington

March 17, 1980

The Honorable
John H. Shenefield,
Associate Attorney General,
Department of Justice.

Dear Mr. Associate Attorney General:

I would like to call to your attention the decision of the United States Court of Appeals for the Seventh Circuit in the Uranium Antitrust Litigation (*Westinghouse, Inc.* v. *Rio Algom, Ltd., et al,* Nos. 79-1427, 79-1502, 79-1641, 79-2004, 79-2318, 79-2319, 79-2320 and 79-2321). The Department of State requests your assistance in drawing to the attention of the Court the concern of the United States Government over the Court's criticism of friendly governments for presenting their views to the Court as *amici curiae.* The Court stated "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction" (Opinion, p. 13). For reasons that may not have been apparent to the Court, this language has caused serious embarrassment to the United States in its relations with some of our closest allies.

The fact is that the foreign governments concerned have substantial interest not only in this litigation, but also in certain broader issues which it raises. There has been a considerable high-level diplomatic correspondence over the matter for several years. These concerns stem from a fundamental difference of opinion between these governments and the United States Government over the

propriety of the exercise of United States jurisdiction, including but not limited to United States antitrust jurisdiction, over persons of foreign nationality for actions taken outside the territorial jurisdiction of the United States. In this case the foreign governments have further concerns arising out of their involvement in developing and/or implementing official policies concerning uranium marketing which they deemed consistent with their national interest and which are now being challenged, not through diplomatic channels, but through private damage litigation in a U.S. court.

Although the United States Government does not share some of the views presented by the foreign governments, we recognize the genuineness of their concerns and believe that they should be afforded an opportunity to present their views to the courts. Accordingly, when we were approached by the foreign governments on the matter, we affirmatively encouraged them to appear *amici curiae* and actively supported their applications for leave to so appear.

The result is that, although the United States is not a party to the Uranium Antitrust Litigation and has taken no position on any of the issues in the case (and although the Department of State certainly does not condone the non-appearance of the nine defaulting defendants), we do recognize the important international implications of the matter and the propriety of the appearances of the Governments of Australia, Canada, South Africa, and the United Kingdom. Their briefs made clear that the issues involved transcend the particular case or the interests of the defaulting companies.

The Department's support and active encouragement of *amicus* filings by foreign governments is rooted in important considerations of public policy. Specifically, we believe that both the administration of justice and

the foreign relations of the United States are best served when the United States courts take into consideration the views of foreign governments on issues of concern to them. It is important that courts be made aware of the international implications of their decisions and that they give appropriate weight to these considerations in the process of making their decisions. *Amicus* filings by foreign governments can assist the court both in doing justice to the private litigants in the case and in assessing the public policy implications of their particular rulings. Moreover, since the United States occasionally wishes an opportunity to be heard in foreign courts, it behooves us to assist other governments in appearing in our courts.

As to the manner in which the views of foreign governments are presented, it used to be common practice for such a government to express its views in a diplomatic note and request the Department of State to transmit the note to the appropriate court. In 1978, however, the Clerk of the Supreme Court of the United States notified the Solicitor General that the Federal Judiciary preferred an *amicus* filing in such cases, and the Department of State has since encouraged foreign governments to present their views directly to the courts by counsel. As noted above, the foreign governments who submitted briefs in the Uranium Antitrust Litgiation did so at the suggestion of the United States Government, and in such circumstances it is understandable that they should be deeply concerned over the criticism of their action by the Court of Appeals.

On behalf of the Department of State, I respectfully request that you communicate these views to the Court of Appeals for the Seventh Circuit for such action, if any, as the Court may deem appropriate. It is our belief that in future proceedings in this and other cases, the courts should give due consideration to the views of interested

foreign governments and take into account appropriate considerations of comity where there is possible conflict between the laws or policies of nation states.

Sincerely yours,

/s/ Roberts B. Owen
ROBERTS B. OWEN

APPENDIX R

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
Washington, D.C. 20530

March 18, 1980

Mr. Thomas F. Strubbe
Clerk of the United States
Court of Appeals for the
Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: Westinghouse, Inc. v. Rio Algom, Ltd., et al., Nos. 79-1427, 79-1502, 79-1641, 79-2004, 79-2318, 79-2319, 79-2320 and 79-2321

Dear Mr. Strubbe:

The Court in its recent opinion raised questions about the propriety of the appearances of foreign governments as *amici curiae*. To prevent any misunderstanding in the future, I am transmitting herewith, for the information of the Court, a letter from Roberts B. Owen, the Legal Adviser of the Department of State.

As Mr. Owen's letter indicates, foreign governments may have interests in issues that arise in federal litigation that transcend, in their view, a particular case or the interests of the parties therein. The former practice was for such expressions by foreign governments to be communicated by diplomatic notes, delivered to the federal courts by the Department of State. In 1978, however, the Clerk of the United States Supreme Court notified the Solicitor General that a foreign government that desired to present its views to the federal courts on a pending case should do so by way of a brief *amicus curiae*. Accordingly, since that time, both the Depart-

ment of State and the Department of Justice have consistently encouraged interested foreign governments to submit their positions directly to the courts as *amici*. (In a similar fashion, we may wish to appear in foreign courts to make known the views of the United States on cases abroad that could affect our own national interests.) It is our judgment that such presentations may assist the judiciary in giving due consideration to the views of foreign governments and in making the necessary accommodations between the laws and policies of the various sovereign nations.

I hope Mr. Owen's letter, in which the Department of Justice fully concurs, will clarify the situation and aid the Court in assessing these presentations on behalf of foreign governments. Please let me know if we can provide any additional information for the Court. Thank you for your consideration in this matter.

Sincerely yours,

/s/ JOHN H. SHENEFIELD
Associate Attorney General

Enclosure

cc: See Attached Service List

APPENDIX S

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

Washington, D.C. 20530

6, May 1980

The Honorable Prentice H. Marshall
United States District Judge
United States District Court
Northern District of Illinois
Chicago, Illinois 60604

Re: Westinghouse, Inc. v. Rio Algom, Ltd., et al., No. 76 C 3830

Dear Judge Marshall:

This letter constitutes a formal statement of interest by the United States in the above-captioned litigation. The case implicates foreign policy concerns of both the United States and foreign governments. Australia, Canada, France, South Africa, and the United Kingdom have all expressed serious concern at what they see as the exercise of the United States jurisdiction over activities of foreign persons outside the territory of the United States challenging their authority to establish national policies for corporate activity in their countries. The recent adoption of administrative and legislative measures by some foreign governments in response to the initiation of this lawsuit testifies to the intensity and authenticity of their respective interests. The views and representations advanced by these foreign governments are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity. See, e.g., *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Timberlane Lumber Co.*

v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States.

Foreign governments may perceive particular federal litigation to which they are not parties as threatening to their sovereign interests. At one time, it was customary for foreign governments to communicate such concerns through diplomatic notes, delivered to the federal courts by the Department of State. In 1978, however, the Clerk of the United States Supreme Court notified the Solicitor General that a foreign government that desired to present its views to the federal courts on a pending case should do so by way of a brief *amicus curiae*. Accordingly, since that time, both the Department of State and the Department of Justice have consistently encouraged interested foreign governments to submit their positions directly to the courts as *amici*. It would be improper, therefore, to discount the importance of international comity in a particular case simply because foreign governments have expressed their views to the court without the intercession of the Department of State.

Finally, the United States urges that it would be inappropriate, in the absence of bad faith, to inflict punishment against a defendant in the above-captioned case for inability to comply with a discovery order of the court because of a contrary foreign criminal law; the consequences of the absence of complete discovery should be assessed by reference to the multiple factors identified in *Societe Internationale* v. *Rogers, supra.*

Respectfully submitted,

/s/ John H. Shenefield
JOHN H. SHENEFIELD
Associate Attorney General

APPENDIX T

[SEAL]

Minister of Energy,
Mines and Resources

Ministre de L'Energie
des Mines et des Ressources
Ottawa K1A OE4, Ontario

August 17, 1972

Dr. D. G. Hurst
President
Atomic Energy Control Board
107 Sparks Street
Ottawa, Ontario

Dear Dr. Hurst:

Uranium Marketing Arrangement

On June 29, 1972, Cabinet approved the terms of a uranium export marketing arrangement proposed by producers in Canada and several other countries. In order to enforce compliance with the terms of the marketing arrangements Cabinet also approved a proposal to issue an appropriate Regulation pursuant to section 9 of the Atomic Energy Control Act together with a Direction to be given to the Board pursuant to section 7 of the Act.

On July 27, 1972, an amendment to section 201 of the Atomic Energy Control Regulations was approved by Order-in-Council P.C. 1972-1719 (copy attached). The amendment is scheduled for publication on August 23, 1972.

The text of the proposed Direction having been agreed upon interdepartmentally and subsequently approved by Cabinet on July 13, 1972, is attached hereto.

You are hereby instructed to ensure that the terms and conditions of uranium export contracts entered into by Canadian producers on or after January 1, 1972 and covering the export sale of uranium during the period 1972 to 1978 inclusive which have not been disposed of by the Board by August 23, 1972 are in accord with the criteria set forth in the above-mentioned Direction.

Yours sincerely,

/s/ Donald S. Macdonald
DONALD S. MACDONALD

DIRECTION TO THE ATOMIC ENERGY CONTROL BOARD PURSUANT TO SECTION 7 OF THE ATOMIC ENERGY CONTROL ACT

When reviewing contracts for the export of the prescribed substances referred to in the attached Regulation pursuant to the Canadian Uranium Policy Statement dated June 19, 1969, you are also instructed to ensure that such contracts are in accord with the following minimum price levels and volumes of sales of the prescribed substances intended for export.

The following schedule of minimum price levels is to apply to export contracts which have not been disposed of by the Board at the time of the coming into force of this Direction made pursuant to section 7 of the Atomic Energy Control Act.

	U_3O_8 and UF_6 Minimum Prices in U.S. Dollars			
Year	For Contracts to Japan, Korea and Taiwan		For all other Contracts to end users[1]	
	U_3O_8[2]	UF_6[3]	U_3O_8[2]	UF_6[3]
1972	5.60	7.90	5.40	7.65
1973	5.95	8.35	5.75	8.10
1974	6.30	8.80	6.10	8.55
1975	6.65	9.30	6.45	9.05
1976	7.00	9.75	6.80	9.50
1977	7.35	10.20	7.15	9.95
1978	7.70	10.70	7.50	10.45

(1) Excluding those in Canada, Australia, France, South Africa and the United States.

(2) Expressed in U.S. $ per lb. U_3O_8 c.i.f. conversion facilities.

(3) Expressed in U.S. $ per lb. of U contained in UF_6 delivered to the U.S.A.E.C. diffusion plant.

These prices include charges for weighing, sampling and conversion losses but exclude interest charges. The above c.i.f. prices apply to any converter. If f.o.b. prices are quoted then reduction of up to 10¢ per lb. U_3O_8 through

1975 and 15¢ per lb. U_3O_8 from 1976 to 1978 can be made.

The following market quotas have been established:

Group	1972-77	1978-80
Canada	33.50%	23.22%
Nufcor	23.75	19.26
Uranex	21.75	19.26
Australia	17.00	24.44
Rio Tinto Zinc	4.00	13.82

The agreed distribution of the Canadian 1972-77 quota is as follows:

Supplier	Amount	
	Tons U_3O_8	Percentage
Denison Mines Limited-Uranium Canada Limited*	4,500	51.67
Gulf Minerals-Uranerz Canada Limited	1,900	21.81
Denison Mines Limited	865	9.93
Rio Algom Mines Limited	865	9.93
Eldorado Nuclear Limited	580	6.66
TOTAL	8,710	100.00

*To be supplied to Spain from the Joint Venture Stockpile and the General Government Stockpile. The minimum price schedule will not apply to the Spanish contract because a bid had been submitted to Spain by Denison Mines prior to the internationally-agreed exclusion date of January 1, 1972.

The tonnages quoted are based on an assumed uncommitted market during the period 1972-77 of 26,000 tons U_3O_8. Since that estimate may be either too high or too low, the definitive figure is the percentage of the actual market.

Canada's allocation for the period 1978-80 is 23.22% of an assumed uncommitted market of 45,000 tons U_3O_8, i.e. 10,450 tons. The distribution of this quota has not been settled as yet among the Canadian producers. Once it has been established, a further Direction will be issued.

[SEAL]

Minister of Energy,
Mines and Resources

Ministre de L'Energie,
des Mines et des Ressources
Ottawa, Ontario,
K1A OE4,

May 22, 1973

CONFIDENTIAL

Dr. D.G. Hurst.
President,
Atomic Energy Control Board,
P.O. Box 1046
Ottawa, Ontario, K1P 5S9

Dear Dr. Hurst:

Uranium Marketing Arrangement

It is now necessary to issue an addition to my earlier Directions on this subject.

The distribution of the Canadian 1978-80 quota is to be as follows:

Supplier	Amount	
	Tons U_3O_8	Percentage
Denison Mines Limited	2665	25.5
Rio Algom Mines Limited	2665	25.5
Gulf Minerals—Uranerz Canada Limited	3344	32.0
Eldorado Nuclear Limited	1776	17.0
	10,450	100.0

The tonnages quoted are based on an assumed available market for Canada during the period 1978-80 of 10,450 tons U_3O_8. Since that estimate may be either too high or too low, the definitive figure is the percentage of the actual market.

The new price schedule outlined below will apply from April 11, 1973 to all contracts based on new bids submitted by companies on or after that date.

Year	U_3O_8 and UF_6 Minimum Prices in U.S. Dollars			
	For contracts to Japan, Korea and Taiwan		For all other contracts to end users[1]	
	U_3O_8[2]	UF_6[3]	U_3O_8[2]	UF_6[3]
1973	6.15	18.95	6.00	18.55
1974	6.55	20.10	6.40	19.70
1975	6.95	21.30	6.80	20.90
1976	7.45	22.70	7.30	22.30
1977	7.95	24.10	7.80	23.70
1978	8.45	25.55	8.30	25.15

(1) Excluding those in Canada, Australia, France, South Africa and the United States.

(2) Expressed in U.S. $ per lb. U_3O_8 c.i.f. conversion facilities.

(3) Expressed in U.S. $ per kg. U contained in UF_6 c.i.f. enrichment plant.

The prices for UF_6 include charges for weighing, sampling and conversion losses but exclude interest charges. If f.o.b. prices are quoted, then reductions of up to 10¢ per lb. U_3O_8 through 1975 and 15¢ per lb. U_3O_8 from 1976 to 1978 can be made.

Yours sincerely,

Original signed by
D.S. Macdonald
DONALD S. MACDONALD

[SEAL]

Minister of Energy,
Mines and Resources

Ministre est L'Energie,
des Mines et des Ressources
Ottawa, Ontario,
K1A OE4

August 31, 1973

Dr. D. G. Hurst,
President,
Atomic Energy Control Board
Birks Bldg., 107 Sparks St.,
P.O. Box 1046,
Ottawa, Ontario, K1P 5S9.

Dear Dr. Hurst:

In view of the continued fluctuation of North American currencies relative to those of certain other industrialized nations, the price schedule given in my letter of May 22, 1973 warrants revision. I therefore now wish to issue an addition to my earlier directions on uranium marketing.

The new price schedule outlined below will apply from August 3, 1973 to all contracts based on new bids submitted by companies on or after that date.

Year	U_3O_8 and UF_6 Minimum Prices in U.S. Dollars			
	For contracts to Japan, Korea and Taiwan		For all other contracts to end users[1]	
	U_3O_8[2]	UF_6[3]	U_3O_8[2]	UF_6[3]
1973	6.65	20.25	6.50	19.85
1974	7.05	21.40	6.90	21.00
7975	7.45	22.60	7.30	22.20
1976	7.95	24.00	7.80	23.60
1977	8.45	25.40	8.30	25.00
1978	9.05	27.10	8.90	26.70

(1) Excluding those in Canada, Australia, France, South Africa and the United States.

(2) Expressed in U.S. $ per lb. U_3O_8 c.i.f. conversion facilities.

(3) Expressed in U.S. $ per kg. U contained in UF_6 c.i.f. enrichment plant.

The prices for UF_6 include charges for weighing, sampling and conversion losses but exclude interest charges. If f.o.b. prices are quoted, then reductions of up to 10¢ per lb. U_3O_8 through 1975 and 15¢ per lb. U_3O_8 from 1976 to 1978 can be made.

If North American currencies continue to fluctuate it may be necessary to modify this price schedule again.

Yours sincerely,

DONALD S. MACDONALD
Hon. Donald S. Macdonald

OJCR:ELMc
Aug. 27, 1973.

Ottawa, Ontario
K1A OE4

October 30, 1973

Dr. D. G. Hurst,
President,
Atomic Energy Control Board,
Birks Bldg., 107 Sparks St.,
P.O. Box 1046,
Ottawa, Ontario, K1P 5S9.

Dear Dr. Hurst:

This letter supersedes the direction given in my letters of August 31, 1973 and is an addition to my earlier directions on uranium marketing.

The new price schedule outlined below will apply from October 9, 1973 to all contracts based on new bids submitted by companies on or after that date.

Year	U_3O_8 and UF_6 Minimum Prices in U.S. Dollars			
	For contracts to Japan, Korea and Taiwan		For all other contracts to end users[1]	
	U_3O_8[2]	UF_6[3]	U_3O_8[2]	UF_6[3]
1973	6.65	20.25	6.50	19.85
1974	7.15	21.65	7.00	21.25
1975	7.65	23.10	7.50	22.70
1976	8.15	24.50	8.00	24.10
1977	8.90	26.60	8.75	26.20
1978	9.65	28.65	9.50	28.25

[1] Excluding those in Canada, Australia, France, South Africa and the United States.

[2] Expressed in U.S. $ per lb. U_3O_8 c.i.f. conversion facilities.

[3] Expressed in U.S. $ per kg. U contained in UF_6 c.i.f. enrichment plant.

The prices for UF_6 include charges for weighing, sampling and conversion losses but exclude interest charges.

If f.o.b. prices are quoted, then reductions of up to 10¢ per lb. U_3O_8 through 1975 and 15¢ per lb U_3O_8 from 1978 can be made.

Yours sincerely,

DONALD S. MACDONALD

(Letterhead of Minister)

Ottawa, Ontario
K1A CE4

March 6, 1974

Dr. D. G. Hurst,
President
Atomic Energy Control Board,
P.O. Box 1046,
Ottawa, Ontario—K1P 5S9.

Dear Dr. Hurst:

Uranium Marketing Arrangement

During the past two months we have seen indications that the market for uranium may be switching from a buyers' to a sellers' market. In the light of this, I have reviewed my earlier directions to you and find the minimum price schedule given in my letter of October 30, 1973 warrants revision. I therefore now wish to issue an addition to my earlier directions on uranium marketing based on bids submitted by companies on or after January 28, 1974.

All contracts for the sale of Canadian uranium destined for delivery to all countries except Canada, United States, Australia, France and South Africa must be in accordance with either the following minimum fixed price schedule or the following escalating price formula:

U_3O_8 and UF_6 Minimum Prices in U.S. Dollars

Year	U_3O_8 (1)	UF_6 (2)
1974	8.20	24.80
1975	9.05	26.70
1976	10.00	29.30
1977	11.05	32.15
1978	12.20	35.30

(1) Expressed in U.S. $ per lb. U_3O_8 c.i.f. conversion facility.

(2) Expressed in U.S. $ per kg. U contained in UF_6 c.i.f. enrichment plant delivery point.

The prices for UF_6 include charges for weighing, sampling and conversion losses but exclude interest charges. If F.O.B. prices are quoted, then reductions of up to 10¢ per lb U_3O_8 for deliveries through 1975 and 15¢ per lb U_3O_8 for deliveries from 1976 through 1978 can be made.

For deliveries after 1978 but not beyond 1985 or as an alternative to the minimum fixed price schedule, escalated prices, on a base price of U.S. $9.70/lb U_3O_8 c.i.f. converters ($28.30/kg U in UF_6 c.i.f. all enrichment delivery points) may be offered from any year provided that:

(a) the escalation formula is to operate from 1974 at the stipulated minimum base price irrespective of the first delivery year in the contract;

(b) at least 80% of the price is subject to escalation; and

(c) the "labour" and the "materials" cost components of the escalation formula are at least 30% each.

As in the case of the minimum fixed price schedule the base price for UF_6 includes charges for weighing, sampling and conversion losses but excludes interest charges. If F.O.B. prices are quoted, then the base price may be reduced by up to 10¢ per lb U_3O_8 for deliveries through 1975 and 15¢ per lb U_3O_8 for deliveries from 1976 through 1978.

Yours sincerely,

Original signed by

Donald S. Macdonald
DONALD S. MCDONALD.

HBM:ELMc

19 Feb. 1974.

APPENDIX U

SUPREME COURT OF CANADA

[SEAL]

COUR SUPREME DU CANADA

GULF OIL CORPORATION

v.

GULF CANADA LIMITED *et al.*

CORAM:

The Right Honourable Bora Laskin, P.C., C.J.C.
The Hon. Mr. Justice Martland
The Hon. Mr. Justice Ritchie
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice McIntyre

Application heard February 19 and 20, 1980

Judgment pronounced March 18, 1980

Reasons for judgment by
The Chief Justice

Concurred in by
The Hon. Mr. Justice Martland
The Hon. Mr. Justice Ritchie
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice McIntyre

Counsel at hearing:

For the appellant:
Mr. R. A. Smith, Q.C.
Mr. D. E. Wires

For the respondents:
Gulf Canada Ltd. and C. D. Shepard
Mr. R. M. Loudon, Q.C.
Mr. M. Mungovan

Gulf Minerals Canada Ltd. and R. Neil Taylor
Mr. R. M. Loudon, Q.C.
Mr. R. J. Morris

Attorney General of Canada
Mr. T. B. Smith, Q.C.
Mr. Lawson Hunter

GULF OIL CORPORATION

c.

GULF CANADA LIMITED *et autres*

CORAM:

Le très honorable Bora Laskin, C.P., J.C.C.
L'honorable juge Martland
L'honorable juge Ritchie
L'honorable juge Beetz
L'honorable juge McIntyre

Demande entendue les 19 et 20 février 1980

Jugement prononcé le 18 mars 1980

Motifs de jugement par
Le Juge en chef

Souscrivent à l'avis du Juge en chef
L'honorable juge Martland
L'honorable juge Ritchie
L'honorable juge Beetz
L'honorable juge McIntyre

Avocats à l'audience:

Pour l'appelante:
Me R. A. Smith, c.r.
Me D. E. Wires

Pour les intimés:
Gulf Canada Ltd. et C. D. Shepard
Me R. M. Loudon, c.r.
Me M. Mungovan

Gulf Minerals Canada Ltd. et R. Neil Taylor
Me R. M. Loudon, c.r.
Me R. J. Morris

Le Procureur général du Canada
Me T. B. Smith, c.r.
Me Lawson Hunter

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF the *Canada Evidence Act*, R.S.C. 1970, c. E-10, Part II, sections 40-48 and the *Uranium Information Security Regulations*, SOR/77-836, Section 3(a)(i)

AND IN THE MATTER OF actions pending in United States District Courts for the Northern District of Illinois Eastern Division and the Southern District of California,

BETWEEN:

GULF OIL CORPORATION

—and—

GULF CANADA LIMITED, GULF MINERALS CANADA LIMITED, R. NEIL TAYLOR and C. D. SHEPARD

CORAM: The Chief Justice and Martland, Ritchie, Beetz and McIntyre JJ.

THE CHIEF JUSTICE

This is an application, addressed to an unusual original jurisdiction of this Court, to enforce letters rogatory issued (1), out of the United States District Court for the Northern District of Illinois, Eastern Division, by His Honour Judge Marshall of that Court, and (2) out of the United States District Court for the Southern District of California by His Honour Judge Enright of that Court. The letters rogatory were issued, respectively, on December 26, 1979 and on January 2, 1980 and were supplemented on February 12, 1980 and on February 14, 1980 to make it clear that the documents whose production was sought were not to be used for purposes of discovery or of deposition but only for purposes of trial in

pending actions whose origin and course I will refer to later in these reasons.

The application is founded on s. 43 of Part II of the *Canada Evidence Act*, R.S.C. 1970, c. E-10. Section 41 of the *Act* defines "court" to mean the Supreme Court of Canada and any superior court in any Province of Canada; and "judge" is defined to mean any Judge of the Supreme Court of Canada and any Judge of any superior court in any Province of Canada. Section 43 reads as follows:

> 43. Where, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in the Commonwealth and Dependent Territories, or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of a party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, the court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in the order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order, and of any other writings or documents relating to the matter in question that are in the possession or power of such party or witness.

The background to the pending actions (hereinafter referred to as the Chicago and California actions) in the two United States District Courts out of which the letters rogatory issued may be briefly stated. Canada, with federal government encouragement, had begun to develop

a uranium industry in the 1950's, having access to the United States and United Kingdom markets. Until an embargo was put on foreign uranium by the United States in 1964, it had consumed about 70 per cent of the free-world demand for uranium. The embargo left only 30 per cent of the free-world market available to Canadian and other non-United States producers of uranium. After stockpiling uranium and instituting other programmes to assist the uranium industry in Canada, the federal government and representatives of private uranium producers entered into negotiations in 1972 with the governments of France, South Africa and Australia, with certain producers in those countries and with the United Kingdom to establish a marketing arrangement of which a central feature would be the maintenance of minimum prices for the export of uranium to countries other than to members of this cartel arrangement and to the United States. By 1975, uranium prices had risen above the fixed minimum prices and on March 27, 1975 federal government directions in this respect ended. Moreover, the United States announced a relaxation of restrictions on the importation of foreign uranium.

Prior to 1975 Westinghouse Electric Corporation, a Pennsylvania company, which sells, *inter alia*, nuclear reactors to public utility companies, had contracted with those companies to supply uranium for the reactors at prices ranging from $6.00 to $10.00 per pound. However, it did not make any arrangements for supplies of uranium to fulfill its contracts, and by 1975 the spot price for uranium escalated to $25.00 per pound and rose recently to $40.00 per pound. In September, 1975, Westinghouse repudiated its supply contracts, claiming to be excused from performance because of supervening developments making performance commercially impracticable. A number of public utility companies in the United States thereupon sued in various courts therein to enforce their contracts with Westinghouse. The ex-

istence of the uranium cartel became known in the United States in 1976, and Westinghouse as defendant in the public utility companies actions against it sought the issue of letters rogatory by United States Courts to the High Court of Justice in England, to the Supreme Court of New South Wales and to the Supreme Court of Ontario. The letters rogatory were issued accordingly, but enforcement in England was refused by a decision of the House of Lords (*Rio Tinto Zinc Corporation* v. *Westinghouse* [1978] All E.R. 434) which reversed enforcement judgments in the courts below. Australian legislation of 1976 was held to preclude enforcement of the letters rogatory addressed to the Supreme Court of New South Wales. The enforcement action in the Ontario Supreme Court also failed because of a claim of Crown privilege pursuant to s. 41(1)(2) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.) and because of the prior promulgation of the *Uranium Information Security Regulations*, P.C. 1976-2368, SOR/76-674: see *Re Westinghouse Electric Corporation and Dusquene Light Co.* (1977), 16 O.R. 2d 273 (Robins J.). Westinghouse appealed but later abandoned the appeal.

On October 15, 1976, Westinghouse brought the Chicago action against 29 United States and foreign producers, including the applicant Gulf Oil Corporation, an American company, and Gulf Minerals Canada Ltd., a Canadian subsidiary, which is a respondent to the application to enforce the letters rogatory. Gulf Canada Limited, also a subsidiary of Gulf Oil and a respondent here, is not a party in the Chicago action. Westinghouse has claimed unspecified treble damages for conspiracy in violation of United States anti-trust laws, estimating the damages at four to six billion dollars. Gulf Oil and Gulf Minerals have defended the action on several grounds, including act of state and sovereign compulsion. Moreover, Gulf Oil has counterclaimed, alleging illegal combinations and conspiracies as well as illegal monopolization by

Westinghouse of the manufacture and sale of nuclear reactors and nuclear fuel and uranium. Three actions began by the Tennessee Valley Authority (TVA), in other districts and being of the same character, were consolidated by an order of July 31, 1978 with the Westinghouse proceedings and thus became part of the Chicago action. Gulf Oil and Gulf Minerals were defendants in one of the TVA actions.

The action in the District Court for the Southern District of California was instituted on April 7, 1978 by General Atomic Company (a partnership in which Gulf Oil is one of the partners with Scallop Nuclear Inc.) against Exxon Nuclear, Inc., seeking to enforce a contract of May 11, 1973 for the sale and delivery of six million pounds of uranium over a specified period from 1979 through to 1984, and also alleging a breach of anti-trust laws by Exxon. The latter defended on the ground that the contract was invalid because of anti-trust violations, fraud and negligent misrepresentations. Exxon also brough a counterclaim, raising the same issues as those in defense and claiming treble damages. General Atomic Company, Gulf Oil and Scallop were named counterclaim defendants and they raised defences, including act of state and sovereign compulsion.

The Letters Rogatory

In both the Chicago and California actions, orders were made for the production of documents in Canada in the possession or under the control of Gulf Minerals and Gulf Canada. It was the position of Gulf Oil and Gulf Minerals that the documents were relevant to issues in the respective actions and were necessary to establish their defence to the claims made in the two actions. Because of the *Uranium Information Security Regulations* (to which I will refer later) the Canadian subsidiaries were unwilling to violate the prohibition against disclos-

ure prescribed by the *Regulations* or to risk the penalties prescribed for breach. Were it not for the *Regulations*, they were quite prepared to make disclosure and thus to assist their parent company in the two actions.

Gulf Oil thereupon applied for the letters rogatory which it now seeks to have enforced by this Court. The two sets of letters rogatory are similar in their directions and it will be sufficient to refer to those issued in the Chicago action. They are addressed by Judge Marshall to "the Appropriate Judicial Authority in Canada". Included in them are the following paragraphs:

> AND WHEREAS this court is authorized and has exercised jurisdiction over the matters in issue in this consolidated action as a court of competent jurisdiction in the United States of America;
>
> AND WHEREAS it has been shown to us that justice cannot be completely done in these consolidated actions without the testimony of, and the production of documents by, the following witnesses residing in the Province of Ontario, Canada, to wit: Gulf Minerals Canada Limited, 110 Yonge Street, Suite 1400, Toronto, Ontario, Canada M5C 1T4, and R. N. Taylor, its President; and Gulf Canada Limited, Post Office Box 460, Station A, Toronto, Ontario, Canada M5W 1E5, and C. D. Shepard, its Chief Operating Officer;
>
> AND WHEREAS it has been shown that the evidence obtained from the above-named witnesses is necessary for use at the trial of the issues in this consolidated action and we have ordered that this evidence be for purposes of trial herein;
>
> AND WHEREAS the above-named witnesses are beyond the jurisdiction and process of this court and could not otherwise be compelled on pain of sanction to attend under the normal and usual process of

this court as set forth under the Federal Rules of Civil Procedure and then and there answer, under oath, on direct and cross examination, questions propounded to them by counsel for the parties herein and to bring with them documents for inspection, copying and examination hereinafter more particularly described;

AND WHEREAS this court has the jurisdiction and power to authorize the taking of depositions outside its jurisdiction and has hereby authorized by order Gulf Oil Corporation to take depositions from the above-named persons and to produce documents for use at the trial herein subject to this court's rules on the admissibility of evidence.

WE, THEREFORE REQUEST that in the furtherance of justice you will cause such witnesses, Gulf Minerals Canada Limited, Gulf Canada Limited, R. N. Taylor and C. D. Shepard, by the proper and usual process, to appear before Mr. Paul Rosenberger, Special Examiner, a person authorized to administer oaths in the Province of Ontario, at his offices at 390 Bay Street in the City of Toronto, Province of Ontario at a precise time and place by you to be fixed by order and there to answer under oath, or affirmations, the questions and interrogatories to be propounded by counsel for the respective parties and to bring with them all notes, documents, or other written or printed material in their possession or control or in the possession or control of Gulf Minerals Canada Limited or Gulf Canada Limited in any way related to conversations, discussions, or meetings that took place between January 1, 1972 and December 31, 1975 involving them or any director, officer, employee, servant or agent of Gulf Minerals Canada Limited and Gulf Canada Limited or any other person in relation to the ex-

porting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds;

AND WE FURTHER REQUEST that you cause the said questions and answers to be reduced to writing and duly signed by each of the witnesses under oath or affirmation, and such notes, documents or other written or printed material that the said witnesses may produce or identify be marked as Exhibits and returned to us under cover duly sealed and addressed to the clerk of the United States District Court for the Northern District of Illinois, United States of America for production for the purpose of trial herein;

And we shall be ready and willing to do the same for you in a similar case when required.

I should point out that the letters rogatory were sought by Gulf Oil in order to avoid sanctions orders which might result in default judgments or a denial of the right to raise defences to which the Canadian documents would be relevant. Westinghouse and TVA had obtained an order from Judge Marshall in the Chicago action on November 9, 1979 that Gulf Oil and Gulf Minerals and certain other defendants produce documents in Canada which were subject to the *Uranium Information Security Regulations* by January 2, 1980. Judge Marshall accepted the contention that they were relevant to issues in the Chicago action and was not moved by the submission that production was prohibited by Canadian law. A similar order was obtained on November 16, 1979, in the California action, also for production by January 2, 1980.

The reality of a threat of a default judgment was evidenced by what happened in an action brought on December 31, 1975 by United Nuclear Corporation against General Atomic Company in the District Court

of Santa Fe County in New Mexico, invoking that State's anti-trust laws. The action was to set aside contracts under which United Nuclear had contracted to deliver more than twenty-five million pounds of uranium to General Atomic. Production was sought from General Atomic of documents in the possession of Gulf Minerals referrable to the cartel and although efforts were made to obtain the consent of the then Canadian Minister of Energy, Mines and Resources to the production of the documents, consent was refused. Notwithstanding diplomatic intervention by the Canadian Embassy, expressing concern about an order of a United States Court that, it said, offended international comity, the Judge in the New Mexico action issued a sanctions order and a default judgment against General Atomic for its failure to produce or identify the Canadian documents. It was said in an affidavit filed in the present proceedings by American counsel for General Atomic, who also acted for Gulf Oil and Gulf Minerals, that the sanctions order deprived General Atomic of the benefit of uranium contracts valued at nine hundred million dollars.

The Uranium Information Security Regulations

I come now to consider the *Uranium Information Security Regulations* which were first passed on September 21, 1976, as P.C. 1976-2368, SOR/76-644. They were replaced on October 13, 1977 by an amended version, P.C. 1977-2923, SOR/77-836. These, in turn, were consolidated on August 15, 1979, with some changes, in the *Consolidated Regulations of Canada*, c. 366. The authority for the regulations, recited in them, was s. 9 of the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, giving power to the Atomic Energy Control Board, with the approval of the Governor in Council, to make regulations as specified in paras. (a) to (g) of s. 9. I shall return to s. 9 later in these reasons.

Section 2 of the original regulations was as follows:

> 2. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds, shall
>
> (a) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless
>
> (i) he is required to do so by or under a law of Canada, or
>
> (ii) he does so with the consent of the Minister of Energy, Mines and Resources; or
>
> (b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

In the substituted regulations, a definition of "foreign tribunal" was introduced as s. 2 and it defined the term to include any court or grand jury and any person authorized or permitted under foreign law to take or receive evidence whether on behalf of a court or grand jury or otherwise. Section 3 was in these words:

> 3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between Jan-

uary 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds shall

(a) release any such note, document or material or disclose or communicate the contents thereof to any person, foreign government or branch or agency thereof or to any foreign tribunal unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

The French version of s. 3 does not mention "any person" and the same discordance appears in the consolidation. On the other hand, although both the English and French versions define "foreign tribunal", the English consolidated version does not include the term in its substantive s. 3, having adopted, by mistake, the original s. 2, a mistake not made in the French version. Again, there is a difference between s. 3 in the substituted regulations of October 13, 1977 and the same section in the consolidation: the former prohibits disclosure of documents in the possession of any person respecting conversations or meetings during a specified period "involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds" and the latter encompasses not only "that person or any other person" but also "any government, crown corpora-

tion, agency or other organization" and "in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds".

I do not think that these drafting lapses or changes make any substantial difference to the effect of the regulations, especially in the light of s. 8(2) of the *Official Languages Act*, R.S.C. 1970, c. 0-2. Section 8(1) of the *Official Languages Act* gives authenticity to an enactment in both its versions in the official languages, and s. 8(2) is directed to ensuring compatibility in application, although there may be differences in meaning in the two versions. There is no unsuperable difficulty here in giving a compatible meaning to the regulations; nor can I find that such differences as exist in the two versions affect adversely the position of the applicant Gulf Oil.

It was the contention of the applicant Gulf Oil (and I may say here that counsel for Gulf Minerals supported Gulf Oil in this proceeding in all respects but, acting also for Gulf Canada, took no position on any of the issues) that the *Uranium Information Security Regulations* were *ultra vires* in all of their versions because they were not authorized under any of the subparagraphs of s. 9 of the *Atomic Energy Control Act*. The relevant subparagraphs are (d), (e) and (g) and they read as follows (preceded by the opening words of s. 9):

> 9. The Board may with the approval of the Governor in Council make regulations
>
> ...
>
> (d) regulating the production, import, export, transportation, refining, possession, ownership, use or sale of prescribed substances and any other things that in the opinion of the Board may be used for the production, use or application of atomic energy;

> (e) for the purpose of keeping secret information respecting the production, use and application of, and research and investigations with respect to, atomic energy, as in the opinion of the Board, the public interest may require;
>
> . . .
>
> (g) generally as the Board may deem necessary for carrying out any of the provisions or purposes of this Act.

Subparagraph (e) respecting secrecy of information covers "production" and "use" which were referred to in the original regulations, were dropped in the substituted regulations and restored in the consolidation. However, it is production and use of atomic energy which is referred to in subparagraph (e) and not uranium or its derivatives or compounds. Section 2 of the *Atomic Energy Control Act* defines "atomic energy" to mean all energy of whatever type derived from or created by the transmutation of atoms. The regulations cannot therefore find support in subparagraph (e). Nor does it appear that they can be supported under subparagraph (d). However, in *Re Westinghouse Electric Corporation and Dusquene Light Co., supra,* Robins J. held that they were within the authority granted by subparagraph (g).

If they were validly enacted, the application to enforce the letters rogatory must fail because (1) the Minister of Energy, Mines and Resources has, despite various submissions to him, refused consent to disclosure and, (2) in my opinion, this is not a case where an order for disclosure should be made, assuming that such an order would come within the exception for disclosure under the words "by or under a law of Canada". I should point out that the Minister took the position, in some of his refusals of consent, that he had no authority to give consent because of the decision in *Re Clark and the Attorney-*

General of Canada (1977), 17 O.R. 2d 593, which invalidated the provision for consent by application of the maxim *delegatus non potest delegare*. This is not a matter, however, which I need review here.

Counsel for Gulf Oil contended that its application under s. 43 of the *Canada Evidence Act* came within the exception in the regulations for disclosure upon a favourable order being made by this Court. The counter argument is that, having regard to the thrust of the regulations, the words "by or under a law of Canada" are directed to Canadian legislation providing for the production of evidence in purely domestic litigation. *Re John McManus and Atomic Energy Control Board*, an as yet unreported decision of the Federal Court of Appeal of January 11, 1980, held that the exception under the regulations for disclosure by or under a law of Canada entitled the Court to act under s. 17 of the *Combines Investigation Act*, giving it discretionary power to order production of documents for the purposes of that *Act*. This does not conclude the matter against the position taken by counsel for Gulf Oil and, assuming that the position is a tenable one, the question remains whether this Court should make an order for disclosure and thus enforce the letters rogatory. For the reasons which follow, I hold that it should not.

If the regulations were not validly enacted (and I am prepared for the purposes of this application to proceed on this basis), this does not mean that enforcement of the letters rogatory must automatically follow and disclosure made. A number of serious questions touching the discretionary authority vested in this Court by s. 43 of the *Canada Evidence Act* arise, questions raised by the Attorney-General of Canada in opposing Gulf Oil's application.

The Attorney-General of Canada submitted that even if the regulations went beyond the statutory authority

under which they were purportedly promulgated, they nonetheless reflected federal government policy and it would be a wrongful exercise of discretion for this Court to ignore the policy by enforcing the letters rogatory. Moreover, it was the further contention of the Attorney-General of Canada that the applicant was seeking a declaration from this Court as to the validity of the regulations; it was not defending itself against charges in Canada or defending a civil suit in which it was relevant to impugn the regulations. Indeed, so the submission went, it was clear that a declaration was sought because if the regulations were declared invalid, there would be no need to enforce the letters rogatory because the respondents would then gladly produce the documents. In any event, an application under s. 43 of the *Canada Evidence Act* was said to be an inappropriate vehicle for challenging the validity of regulations; validity should not be determined to enable the enforcement of letters rogatory which were issued by a foreign court in the full knowledge that there were prohibitory regulations in Canada that expressed government policy. Comity should have operated to support a refusal to issue the letters.

The foregoing contentions were subsumed under a wider argument by the Attorney-General of Canada which had two main prongs; first, that this Court should not entertain Gulf Oil's application and, second, that in the exercise of discretion, this Court should refuse the application. I turn to consider this two-fold submission.

The Jurisdiction and Discretion of this Court

Although the relevant sections of the *Canada Evidence Act* vest jurisdiction in this Court, there is also concurrent jurisdiction in provincial superior courts, and the contention of the Attorney-General of Canada was that since this Court is generally an ultimate appellate court, it should refuse to act under s. 43 and leave such original applications under that provision

to the provincial superior courts. The documents whose disclosure is sought under the letters rogatory are now in or can be brought to Toronto, and the *forum conveniens*, it was contended, is the Supreme Court of Ontario. It was also submitted that there was no such urgency as to make it appropriate to leap-frog the ordinary processes of the Canadian judicial system. Again, the applicant, although allegedly in jeopardy of a sanctions order (Judge Marshall in the Chicago action ordered the plaintiffs on January 16, 1980 to file sanctions motions by March 3, 1980 and replies in opposition by April 3, 1980) did not ask for a suspension of the order pending efforts to enforce the letters rogatory and, moreover, the trial in the Chicago action is not to commence until September, 1981. There is the further submission that there are factual issues to be resolved under the letters rogatory and this is best done in a trial court. Reference was made to the judgment of the Manitoba Court of Appeal in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. 3rd 445 where the Court of Appeal, having concurrent jurisdiction with the Court of Queen's Bench in *mandamus*, refused to take jurisdiction. A similar position was taken by the Supreme Court of the United States in *Ohio* v. *Wyandotte Chemical Corp.* (1971), 401 U.S. 493 where it had concurrent jurisdiction with United States District Courts.

I think that these are cogent considerations that point to the desirability of original resort to a provincial superior court. However, because the merits as to enforcement of the letters rogatory were fully argued, I think I should deal with the matter by asserting jurisdiction and considering whether the Court's discretion should be exercised to enforce or to refuse to enforce the letters rogatory.

Crown privilege was not invoked in this case by an affidavit under s. 41(1) or (2) of the *Federal Court Act*,

R.S.C. 1970, c. 10 (2nd supplement) as it was in the *Westinghouse* case decided by Robins J. The central issue touching the discretion of this Court was whether public interest immunity (to use Gulf Oil's phrase) or public policy (to use the term of the Attorney-General of Canada) could be invoked instead and, if so, whether it was of sufficient weight to overcome considerations of comity. It was not disputed that it was open to the Attorney-General of Canada to rely on public policy apart from Crown privilege. Moreover, in my opinion, it is not a ground for denying recognition of the public policy asserted here by the Attorney-General of Canada that the cartel arrangement came to an end before the Chicago and California actions were instituted or that the Government of Canada wished to prevent disclosure of the information sought under the letters rogatory, despite the previous abandonment of the arrangements under which the information was collected and recorded.

The participation of the Government of Canada in the cartel arrangement was made known to the public, and it seems to me that the resistance to disclosure was not so much a matter of the maintenance of secrecy as it was of an assertion of Canadian sovereignty to resist the extraterritorial application of United States anti-trust laws.

The Government of Canada was on record in the Chicago action by an *amicus* brief presented to Judge Marshall that it regarded its sovereign position to be put in question by the attempt to secure disclosure of the information now sought under the letters rogatory. I quote here a small portion of the brief:

> Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken

in implementation of Canadian government policy. Accordingly, when it became clear that documents located in Canada bearing on the international uranium marketing arrangement might be removed to the United States in response to proceedings there, the Canadian government promulgated the Uranium Information Security Regulations, on September 23, 1976. The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies.

It is true that the brief concentrated on the *Uranium Information Security Regulations* but the national interest which was expressed in the brief transcended the regulations. This is particularly evident in the press release of the then Minister of Energy, Mines and Resources of October 14, 1977, being an exhibit to the affidavit of John R. Light, filed in these proceedings. I reproduce the opening paragraphs of this release:

> Over the past several weeks, the government has been criticized for actions that it took from 1972-75 to protect the Canadian uranium industry from the consequences of U.S. actions. I want to respond to these criticisms today in order to set the record straight.
>
> The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore,

> authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. The government approved this arrangement in 1972, on the specific understanding that it would not apply to the markets of Canada, Australia, South Africa, France and the United States. It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production. This policy was defensible in 1972 and it is no less defensible today.

Again, although the Minister later in the release emphasized the *Uranium Information Security Regulations*, they were merely an expression of the Government's public policy and it is the policy rather than the regulations that, in this case, is a factor in the Court's exercise of its discretion.

Robins J. in the *Westinghouse* case, *supra*, took account of the policy in refusing to enforce certain letters rogatory and did so as I read his reasons, even apart from Crown privilege which was asserted before him and apart from the regulations. Thus, he said (at p. 290 of 16 O.R. 2d):

> The enforcement of letters rogatory is always a matter within the discretionary power of the Court. Their enforcement is based upon international comity or courtesy proceeding from the law of nations. Inherent in the idea of international comity is a mutuality of purpose and of power. As a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in

obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of Justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries: see, for example, *National Telefilm Associates Inc.* v. *United Artists' Corp, et al* (1958), 14 D.L.R. (2d) 343, generally, Castel, *Canadian Conflict of Laws* (1975), p. 691 *et seq.* It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal is made or at the expense of injustice to its citizens; and comity leaves to the Court whose power is invoked the determination of the legality, propriety or rightfulness of its exercise: see generally 15A Corp. Jur. Sec., pp. 391-7; Szaszy, *International Civil Procedure* (1967), pp. 652-3.

In my judgment, there are aspects to the present case which bear upon the Court's exercise of its discretion and militate against honouring these letters rogatory.

The most important of these is public policy. This case constitutes a rare occasion, certainly in relations with the United States, in which, in my opinion, legal assistance should be denied on the ground that to grant it would be to run counter to a public policy of this country. The policy I refer to has been clearly and forcefully expressed; it relates specifically to the evidence and documents in issue. By affidavit and public statement a Minister of the Crown has made it plain that the Government of Canada has, as a matter of public policy, taken the position that the information and documents sought should not be disclosed. Crown privilege has been

asserted on the basis, *inter alia*, that the documents relate to the marketing of uranium which constituted "an essential part of the policy" of the Government and in the public interest should not be produced or discovered; Security Regulations have been promulgated with the approval of the Governor in Council that prohibit the production of the documents or the disclosure of their contents; the Minister has indicated that the matter must be regarded as an issue of sovereignty. In these circumstances the Court, in my view, should take judicial cognizance of the stated public policy in exercising its discretionary power—*Adams* v. *Adams*, [1971] P. 188 at p. 198; *The "Arantzazu Mendi"*, [1939] A.C. 256 at p. 264—and should not force the disclosure of information if to do so would, on the authority of the Government, be harmful to the public interest. To decline to lend a foreign Court assistance through the use of domestic judicial machinery in such circumstances is not to act in breach of the doctrine of comity but in accord with it.

Nor should the Court exercise its discretionary power to enforce letters rogatory of a foreign Court when one of the purposes of those letters rogatory is, as the argument was put to me, to procure evidence that "the activities of the Federal Government and/or its representatives, relative to the cartel, constitute the commission of and/or the counselling of an offence under . . . the laws of the *lex fori*". It is inappropriate, in my opinion, to invoke the doctrine of comity of nations in an effort to search out testimony and documents designed to permit a foreign tribunal to determine whether actions taken by or on behalf of the Government of Canada were contrary or inconsistent with the laws of a foreign country. It should not be necessary to add that Canada is a fully sovereign nation and not accountable to the

> tribunals of a foreign State. Similarly, in this very special factual situation, letters rogatory should not, in my opinion, be enforced against officers of Canadian corporations whose actions during the pertinent period had received the stamp of approval of the Canadian Government. The refusal of judicial assistance for these reasons does not disappoint comity.

The same point was made in *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, a judgment of the House of Lords. I refer to the words of Lord Wilberforce, at p. 448:

> My Lords, I think that there is no doubt that, in deciding whether to give effect to letters rogatory, the courts are entitled to have regard to any possible prejudices to the sovereignty of the United Kingdom; that is expressly provided for in art 12(b) of the Hague Convention. Equally, that in a matter affecting the sovereignty of the United Kingdom the courts are entitled to take account of the declared policy of Her Majesty's Government is in my opinion beyond doubt. Indeed, this follows as the counterpart of the action which the United States Government has taken. For, as the order of 18th July 1977 and the letter of 12th July 1977 make plain, the order compelling testimony and granting immunity is made in extraordinary circumstances relating to the public interest of the United States. That the making of the order is a matter of government policy, and not related to the civil proceedings in Richmond, is confirmed beyond doubt by the statement made before Judge Merhige on 16th June 1977, and repeated in the letter of the Attorney General of the United States of 12th July 1977, that there is a firm policy against seeking orders under §§ 6002 and 6003 in private litigation. It appears that the present is the only case in which

such an order has been made. (One other instance cited is not comparable.) But if public interest enters into this matter on one side, so it must be taken account of on the other; and as the views of the executive in the United States of America impel the making of the order, so must the views of the executive in the United Kingdom be considered when it is a question of implementing the order here. It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.

The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive (see *The Fagernes* [1927] p. 311); they have, as I have stated, no difficulty in doing so.

Counsel for Gulf Oil submitted that public policy or public interest immunity should not be attached to trading or commercial activities of the Government; that it should not be recognized in respect of communications between persons who are not government employees or Ministers of the Crown or between government employees or Ministers and other persons; that, in any event, the public interest relied upon was not adequately described and that it was not shown how the public interest would be damaged by disclosure of the documents requested under the letters rogatory.

The last point may be answered shortly. It is not for a Court, when called upon to consider whether it should enforce letters rogatory, to take issue with the Government's determination of public policy or to measure its

impact. It may be that different considerations will operate where a Canadian court is concerned with Canadian litigation arising out of issues turning on Canadian law. Nor do I think that there is any doubt in this application by Gulf Oil as to what is the public policy which the Government of Canada asserts. Again, there may be room for closer examination, and even assessment, where in Canadian litigation Crown privilege is asserted and the Court may be disposed to examine the documents for which the privilege is claimed. I do not agree that any such assessment or examination is invariably required to enable a Court to consider whether, in its discretion, it should enforce letters rogatory calling for the production of the documents for purposes of proceedings before a foreign tribunal.

Gulf Oil relied on *Burmah Oil Co. Ltd.* v. *Bank of England* (*Attorney-General intervening*), [1979] 3 All E.R. 700 in support of the first two points in its abovementioned submission. It appears to have taken the phrase "public interest immunity" from that case, where it was used in assessing whether Crown privilege should be recognized in respect of a number of documents among those that were listed by the defendant Bank of England as being in its possession. The Bank was quite prepared to make disclosure, but the Government intervened to object to disclosure and supported its objection by an affidavit. The majority of the House of Lords took the view that it ought to examine the documents for which privilege was claimed, being of the opinion that the mere assertion of Crown privilege was not conclusive, and that the case called for balancing the prevention of harm to the state and the interest in the proper administration of justice. As a result of inspection, the conclusion was reached that the documents were not necessary to dispose fairly of the case, and so the objection to production was upheld.

Although "public interest immunity" was associated in the *Burmah Oil* case with a claim of Crown privilege, a situation which is not present here, I take it that counsel for Gulf Oil was using the phrase to encompass also a public policy claim such as was made here by the Attorney-General of Canada. (In the *Burmah Oil* case, Lord Scarman (at p. 731) referred to public interest immunity as a manifestation of public policy.) It does not follow, however, that the same considerations should apply to an assertion of public policy, referable to a request for disclosure to a foreign tribunal, as apply to an assertion of Crown privilege in respect of litigation in Canada under and for the enforcement of Canadian law. The *Burmah Oil* case was a case in the English courts, turning on English law and not involving any element of extraterritorial enforcement of foreign law such as exists in the present application. It must be noted too that the documents for which production was sought in the *Burmah Oil* case were for the purpose of discovery and not, as here, for the purpose of trial.

I do not find anything in the *Burmah Oil* case, and, in particular, in the reasons of Lord Edmund-Davies relied on by counsel for Gulf Oil, to support his contention that public policy considerations should not be recognized in respect of trading or commercial activities of the Government. I can understand that the matter may be one of degree. However, where the Government is party to the arrangements out of which the documents, whose disclosure is sought, emerge, and it has promoted the arrangements as a facet of its energy policy in which the marketing of uranium is a central feature, I fail to see how public policy can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest. Again, the voluminous documents (said to cover 25,000 pages) are not simply private documents drawn up as a result of discussions

and negotiations in which the Government of Canada played no part but, concededly, reflect an input by representatives of the Government.

I think it desirable to clarify the difference between an assertion of Crown privilege, supported by a ministerial affidavit, and a claim of non-disclosure based on public policy. It seemed to me that counsel for Gulf Oil, especially in his reliance on the *Burmah Oil* case and on other cases cited in his factum, dealt with these two matters as if they were interchangeable. Where Crown privilege is asserted, whether in domestic litigation or in litigation arising out of an attempt by a foreign tribunal to obtain evidence for the purposes of the enforcement of foreign law, non-disclosure is the preservation of secrecy in the public interest. However, as the case law indicates, the courts may decide to inspect the documents, whose production is refused on the ground of Crown privilege, in order to satisfy themselves that the claimed privilege is borne out and that the documents are relevant to the issues in the litigation. As already noted, there is no claim of Crown privilege here but rather one of public policy as an assertion of sovereignty against an attempt to enforce foreign law. I do not see that the Crown, the Government, would be entitled to assert public policy against the enforcement of Canadian law in a Canadian court, but would be so entitled against an attempt to enforce foreign law in a Canadian court. Public policy is therefore involved in the application of rules of conflict of laws, as where the enforcement of foreign law in Canadian litigation may be denied because, for example, the foreign law may be a penal law or a tax law and therefore within the categories that are denied enforcement on policy grounds. So too, where letters rogatory are addressed to a Canadian court, Canadian governmental intervention on grounds of public policy may simply reflect an objection to extraterritorial

enforcement of foreign law in violation of Canadian sovereignty.

For the reasons that I have given, I would refuse Gulf Oil's application. In coming to this conclusion I have not dealt with the Attorney-General's submission that the letters rogatory should have been more specific in their reference to the documents whose disclosure was sought, and I leave that issue open.

Although I would dismiss the application of Gulf Oil to enforce the letters rogatory, I would not, in the circumstances, make any order as to costs.